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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JUAN LUIS BOSCIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States of Appeals For the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the denial of a Pre-Trial Motion to Dismiss predicated on Criminal Procedure Rule 6(d) for abuse of the grand jury, an appellable order under the "Collateral Order" exception to the Final Judgment Rule as established by the Ninth Circuit in *United States v. Benjamin*, 812 Frd 548 (9th Cir. 1987) in light of *Mechanik v. United States*, 106 S.Ct. 938, 89 L.Ed.2d 50., or non appellable as established by the Tenth Circuit in *United States v. Taylor*, 798, Fd. 1337 (10th Cir. 1986) upon doing its own interpretation of *Mechanik* (Supra) and adopted by the First Circuit when it denied review for lack of jurisdiction in the present case?

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IN THE

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JUAN LUIS BOSCIO

Petitioner,

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UNITED STATES OF AMERICA

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On Petition For A Writ Of Certiorari To The United States of Appeals For The First Circuit

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PETITION

TO THE HONORABLE COURT:

NOW Comes Petitioner through his undersigned attorney and respectfully prays from this Honorable Court to issue a Writ of Certiorari to review the Order issued and entered by the United States Court of Appeals for the First Circuit on May 28, 1987 and the Order denying rehearing entered on June 22, 1987.

I. OPINION BELOW

a) District Court Order denying the Motion to Dismiss filed by Petitioner Boscio on Rule 6(d).

b) United States Court of Appeals for the First Circuit Memorandum and Order issued and entered May 28, 1987.

c) Order of the Court of Appeals for the First Circuit entered on June 22, 1987 denying rehearing.

II. JURISDICTION

The jurisdiction of this Honorable Court is invoked to review by Writ of Certiorari the Memorandum and Order issued and entered on May 28, 1987 dismissing the appeal from the United States District Court for the District of Puerto Rico of a Motion to Dismiss based on Criminal Procedure Rule 6(d) for abuse of the grand jury in Case Number 85-449(CC), under 28 U.S.C. 1291.

Rehearing was denied by the United States Court of Appeals for the First Circuit in an Order entered on June 22, 1987.

This Honorable Court has jurisdiction to review by Writ of Certiorari under 28 U.S.C. 1254(1) and Rule 17. 1(a) of the Supreme Court Rules.

III. PERTINENT LAWS AND RULES INVOKED IN THIS CASE

28 U.S.C. Section 1291

The Court of Appeals shall have jurisdiction of Appeals from all Final Decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Federal Rule of Criminal Procedure 6(d) pertaining to undue influence on the grand jury.

IV. STATEMENT OF THE CASE

Petitioner Juan Luis Boscio, was indicted on charges for aiding and abetting in violation of 18 U.S.C. Section 1343, on February 1, 1985 and sentenced on October 31, 1985.

That conviction is presently on appeal before the United States Court of Appeals for the First Circuit. United States-appellee v. Juan Luis Boscio-appellant, Case Number 85-1913.

To procure the indictment in that case, many instances of misconduct permeated that are subject to the Appeal and Post-trial Motions pending decision at the U.S. District Court for the District of Puerto Rico for undue influence on the grand jury, unauthorized persons in the grand jury, perjured testimony by the Case Agent, misleading statements of the Prosecutor to the grand jurors, and the simultaneously presence of three prosecutors at the grand jury room (one of which had been the Attorney for the Ponce Municipal Assembly and Legal Advisor to Petitioner as an Assemblyman particularly on the transactions that eventually brought the indictments against him), all an unwarranted influence on the grand jury.

The Petitioner was again indicted the same day he was sentenced on October 31, 1985 on three courts of extortion under 18 U.S.C. Section 1951 and 2, Case 85-449(CC).

Numerous Motions were filed by the several Defendants.

Co-defendant Miguel A. Serrano, filed a Motion to Dimiss on the grounds that his immunized testimony under local grant of immunity, had been utilized to procure the indictment under the Doctrine established in *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 12 L.Ed. 2d 678, 84 S.Ct. 1594 (1964) and *United States v. Kastigar,* 406 U.S. 441, 32 L.Ed. 2d 112, 92 S.Ct. 1653 (1972).

The Court disclosed most of the grand jury minutes to determine if the immunized testimony or any evidence derived from it had been utilized in the indicting process and extensive hearings took place before United States Magistrate J.A. Castellanos.

Once we had access to the grand jury minutes, we discovered new evidence that showed that the indicting grand jury had been undully influenced by the Prosecutor; that the Case Agent had given perjured testimony to procure the indictment against Petitioner Boscio; and that the Prosecutor had intentionally misguided the grand jury so as to prevent them from seeing evidence the grand jurors requested, evidence that would have been exculpatory; the presence of unauthorized persons in the grand jury room and other instances of undue influence before the grand jury, including the utilization of the immunized testimony and other evidence derived from it.

The Assistant U.S. Attorney in charge of the case had stated to the Court that there was only one grand jury dealing with the matter. See Appendix P.19a-20a). Minute of Proceedings before Magistrate Castellanos, on April 8, 1986.

Later, when we were finally granted the grand jury minutes for October 31, 1985, the date of the in-

dictment in the present case, we discovered that the indictment was the product of a second grand jury, because the grand jury that conducted the whole investigation failed to indict for the charges brought in the present case and the term of that grand jury expired on April of 1985. (More than six months prior to the indictment under scrutiny herein.)

That grand jury minute for October 31, 1985 contained an Order given in "Miscellaneous" 84-0031, which reads as follows:

> "IT IS HEREBY ORDERED that in presenting to the Grand jury presided by Mr. Edwin Padovanni, impanelled on December, 1984 the testimony of any witnesses who appeared before the Grand Jury presided by Mr. José Mariani, impanelled on October, 1983 in connection with its investigation of Serrano/Shearson, American Express et. al. The United States Attorney or his designee shall read to the Grand Jury presided by Mr. Edwin Padovani, impanelled on December, 1984 the entire transcript of testimony given by each witness with respect to matters under continuing investigation relative to Serrano/Shearson, American Express et. al. and" . . .

The Prosecutor had procured said Order from Hon. Judge Lafitte by Motion, see Appendix P. 50a-51a and once again misguided the Court when she stated that she wanted all the grand jury minutes transferred to the Second Grand Jury at Appendix Page 51a.

> "The instant Motion is made in good faith, with an interest in achieving judicial economy, and serve the best interest of justice in that *a com-*

> *plete factual scenario would be present to the Grand Jury* for consideration during a determination of probable cause to return a true bill on *a proposed indictment.*" (Emphasis provided.)

On November 21, 1986, Magistrate Castellanos, issued a Report and Recommendation, recommending that the Motion to Dismiss filed by Defendant Serrano, should be granted. (Appendix P. 25a-38a) Report and Recommendation; which was later confirmed in an extense Opinion by Hon. Judge Carmen Cerezo, rendered on April 8, 1987; dismissing Serrano's indictment and establishing that the testimonies before the grand jury had been tainted, as being derived from Serrano's immunized testimony, so that the only evidence brought to this Grand Jury was, tainted evidence, and its fruits.

The Report and Recommendation demonstrates that in spite of that specific Order from the Court in *contempt* of it, the Assistant U.S. Attorney expressively violated the same and brought to the Second Grand Jury only *tainted evidence derived from co-defendant Serrano's ~~im~~munized testimony* before the Local Legislature.

The testimonies of the two other Co-defendants Tormos and Boscio were elicited from them when they were confronted by the F.B.I. Agents with the immunized testimony.

The Magistrate's Report and Recommendation in various places reaches that conclusion from the evidence obtained at the hearing to dismiss filed by Co-defendant Serrano.

> For instance, at Appendix P. 26a, the Report reads:

"In addition, as a result of the same, codefendants Tormos and Boscio subsequently testified before the Grand Jury and also provided various statements to the F.B.I. Although in the overt acts set forth in the indictment any mention to the "Florida Festival" meeting was avoided, codefendants provided, in particular, information to the Grand Jury as to this meeting where the alleged conspiracy was hatched. (Exhibits K, L, N, 7 and 8. See also Grand Jury transcripts of 1/17/85). Knowledge of this meeting was disclosed for the first time through Serrano's immunized testimony and thereafter by codefendants Boscio and Tormos after being approached by the FBI. These events, together with the totality of other evidence discussed hereinafter, attune with the FBI's actions prior and during the Grand Jury hearing caused to charge defendant Serrano for the aforesaid offenses. The alleged charges and ensuring indictment for "kickbacks" are thus tainted."

Again at Appendix P. 30a, Magistrate Castellano concludes:

"Even if some evidence was available to the case agent prior to Serrano's testimony, the existence of such disperse evidence does not necessarily provide the investigative agents the necessary link to prove defendant's participation in this particular offense and the conspiracy charged. It is more likely than not that the lead required was obtained through the immunized information. The investigators had never heard of the "Florida Festival" meeting prior to said testimony, which allowed the verification of the iden-

tity of the alleged co-conspirators. *This subsequently subdues codefendants Boscio's and Tormos' disposition and motivation to provide statements upon the agent's requests, as well as their testimonies before the Grand Jury.* Hence, these codefendants' inclination to testify before the Grand Jury upon approach of the case agent cannot be isolated from the factors that convinced them to cooperate. *United States v. Kurzer*, 534, F. 2d 511, 517 (2d Cir. 1976).

"As to the "Florida Festival" matter the FBI Agent Garcia testified before the Grand Jury on October 31, 1985. He mentioned that "Serrano also testified before the local Senate indicating the same things" as to $220,000 "kickback" payment to codefendant Tormos Vega. (Tr. 5/14/l86, p. 12, lines 7-8. See also Grand Jury Minutes of 10/31/85, Exhibit 5, pp. 11-12)." (Emphasis provided.)

At Appendix P. 33a-34a, once again the Magistrate's conclusions demonstrate that tainted evidence was the one provided to the Grand Jury when he stated:

"The necessary control as to the law enforcement agent's actions in regard to in-depth examination of defendant's immunized testimony was absent. More so since no agent report had been rendered to the prosecution until mid-1985, that is, some four months after the testimony under immunity had been televised, transcribed, and read on numerous occasions by the agent in charge, Agent Garcia's subsequent participation in the evidence gathering process before the

> Grand Jury and hiss interviews with witnesses after the immunized testimony was given is unsurmountable. It is evident that Agent Garcia assisted in the subpoena of witnesses before the Grand Jury and was the assigned agent to present the case before the Grand Jury. He also briefed other agents as to interviewing potential witnesses after defendant had testified, and among others, prepared the exhibit list for the prosecution in this case. The evidence presented during the extensive hearings on the motion to dismiss clearly demonstrates that the case agent continued to investigate the case and follow leads with the benefit of the defendant Serrano's immunized information. *A serious doubt was raised as to why it took 11 months to present to the Grand Jury a case that was allegedly completed.* This is aggravated by the fact of all the efforts made to obtain the transcripts and translation of Serrano's testimony before the Legislature and reading the same three times." (Emphasis provided.)

The Magistrate's final conclusions at Appendix P. 35a were:

> "It is logic to infer that Agent Garcia used the immunized information as a leverage to obtain the testimony, interviews, admissions of and documents brought by other witnesses who testified before the Grand Jury by "whipsawing" one witness to testify against another as proceeds of the Serrano's immunized testimony. *United States v. Romano,* 583 F 2d at 9."
>
> "The Government did not introduce any evidence that the indictment to which codefendants

> Boscio's and Tormos' testimonies contributed was not due to Serrano's immunized testimony, and thus wholly independent from said immunity. The use of immunized testimony as a basis for subsequent questions propounded to a witness constitutes impermissible derivative use of immunized testimony. *Pillsbury v. Conboy,* 459 U.S. 248, 103 S. Ct. 608 (1983). (Emphasis provided.)

Furthermore, United States Magistrate, Hon. Justo Arenas, has recommended dismissal of the indictment on a Post-trial Motion filed by co-defendant Miguel Serrano on Criminal Case 85-024 (GG), establishing that the Grand Jury was tained because the indictment was *solely derived* from the immunized testimony of Miguel Serrano. (See Appendix P. 56a et. seq.).

Thus Magistrate Arenas reaches the same conclusions as did Magistrate Castellanos in this Report and Recommendation (Appendix Page 25a,) so it can be concluded that the materials which were also originally tainted materials at the First Grand Jury, could not be transferred to a Second Grand Jury, or in other words, the original taint accompanied those materials. Thus it can be concluded that the tainted evidence substantially influenced the Grand Jury's decision to indict.

Petitioner also filed a Motion to Dismiss on Double Jeopardy grounds, which is presently under consideration of the First Circuit Court in United States v. Juan Luis Boscio, Case Number 87-1103.

If all the grand jury minutes would have been read to the Grand Jury when the materials were transferred from one grand jury to the other, as ordered by Judge Laffitte, the Second Grand Jury would have

had the whole investigation before it, the who factual scenario and would have been awared of the fact that Petitioner had been already indicted for the same issue in the preceeding case and perhaps would have decided no to indict, like the First Grand Jury did, because the grand jurors in Second Grand Jury, would have gained knowledge that Petitioner had already been indicted for the same issue and the same evidence in the first case.

Under these facts Magistrate Castellanos verbally denied Petitioner's Motion to Dismiss and appeal was filed to the Trial Judge (Appendix Pp. 39a-51a) which was denied by the District Court (Appendix P. 52) and was promptly appealed to the First Circuit Court which in turn denied the appeal for lack of jurisdiction. (Appendix P. 3a.)

We contended at the Court of Appeals for the First Circuit, that since the United States Supreme Court rendered its opinion in *United States v. Mechanik* 106, S.Ct. 938, 82 Led 2d 50 (1986) a denial of a Pre-Trial Motion to Dismiss predicated on Criminal Procedure Rule 6(d) for abuse of the grand jury is an appealable order under the "Collateral Order" exception to the Final Judgment Rule as was established by the Ninth Circuit in *United States v. Benjamin,* 812 F 2d 548 (9th Cir.) (1987), because otherwise the valid constitutional claim would be hopelessly lost in light of the Harmless Error Doctrine established in *Mechanick* (Supra) in the event of a conviction by the petit jury at Trial.

The First Circuit denied jurisdiction basing its decision in *United States v. Taylor*, 798 F 2d 1337 (10th Cir. 1986) therefore adhering to the doctrine that these issues can be raised upon appeal if the

defendants are convicted. (See Appendix P. 3a.) Rehearing was denied and we bring the issue to this Honorable Court.

V. ARGUMENT

The issue presented to the Court of Appeals for the First Circuit is one of constitutional importance because in the present case and the preceding prosecution to which Defendant Boscio has been subjected have been plagued with continuous and diverse misconduct and such constitutional laxity, that this case could be exemplary of improper prosecutorial behavior.

The Courts should not only prevent the intentional disregard of constitutional rights but should also exercise their supervisory power to prevent prosecutorial abuse and deter such future behavior.

The supervisory power doctrine enables a court to establish standards of justice and fair play in criminal proceedings not specifically required by the Constitution or statutes. The Courts have exercised their supervisory powers to dismiss indictments on the basis of prosecutorial misconduct in order to remedy the abuse, to preserve the integrity of the Grand Jury and to deter similar misconduct in the future. *United States v. Samango,* 607 F2d 871, 884 (9th Cir. 1979), thus, indictments have been dismissed or convictions reversed when the prosecutor's misconduct is flagrant and extremely prejudicial; where it has become entrenched and repetitive, *United States v. Birdman,* 602 F2d 547, 559 (3rd Cir. 1979) Cert. denied 444 U.S. 1022 (1980); *United States v. Broward,* 594 F2d 345, 351 (2nd Cir.) Cert Denied 442 U.S. 91 (1979);

United States v. Estepa, 471 F2d 1132, 1137 (2nd. Cir. 1972).

The Prosecutor has misguided the Court and the Grand Jury so as to present to it, only selected material without giving the Grand Jury and its members the opportunity to evaluate the whole investigation and to also evaluate, if in fact Defendant Boscio had already been prosecuted for those facts presented to them.

The prosecutors are bound by a few, clear rules which were carefully frafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.

Federal Rule of Criminal Procedure 6(d) is one of such rule; it is designed to guard the secrecy of the grand jury proceedings, prevent intimidation of jurors, *and guarantee that the grand jury is given the opportunity to make an independent examination of the evidence and render its probable cause and charging determination free of undue prosecutorial influence.* See, *United States v. Echols,* 542 F2d 948, 951 (CA 5 1976), Cert. denied, 431 U.S. 904, 52 L.Ed. 387, 97 S.Ct. 1695 (1977); *United States v. Lill,* 511 F.Supp. 50, 55-52 (SDW. VA. 1980).

In *Stirone v. United States,* 361 U.S. 212, 218, 4 L.Ed. 2d 252, 80 S.Ct. 270 (1960) the Supreme Court stated:

> "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens *acting independently of either prosecuting attorney or judge.*" (Emphasis provided.)

In this case the Prosecutor was bound by the Court Order as it expressed "The United States Attorney or his designee *shall read to the grand jury presided by Mr. Edwin Padovani impanelled on December, 1984 the entire transcript of the testimony given by each witness with respect to matters* under continuing investigation relative to Serrano/Shearson American Express et. al. and . . ." (Appendix P. 49).

It is very significant, that the Prosecutor in order to obtain authority to disclose otherwise prohibited materials of a grand jury invoked Rule 6(e) (3)(c) (iii) and induced and subdued the Court by pretending that the whole investigation was to be transferred to a new grand jury so that a complete factual scenario would be presented to the grand jury. On so doing, she stated in her Motion Appendix P. 51a.:

> "5. The instant motion is made in good faith, with an interest achieving judicial economy, and serve the best interest of justice in that a complete factual scenario would be presented to the grand jury for consideration during a determination of probable cause to return a true bill on a proposed indictment."

Rule 6(e) (3)(c) (iii) in its last paragraph mandates at follows:

> "If the Court order disclosures of matters occurring before the grand jury, *the disclosure shall be made in such manner, at such time and order such conditions as the Court may direct.*" (Emphasis provided.)

Therefore, the Prosecutor was, by the strict mandate of Rule 6(e) (3)(c) (iii) bound to follow the Order of the Court which she disregarded intentionally by

bringing to the Second Grand Jury only selected tainted materials derived from Serrano's immunized testimony (See Magistrate Recommendation when he concluded at Appendix P. 37a:

> "The above findings of fact are adequate to sustain a determination that the government did not defeat the preposition that Serrano's immunized testimony was used by Federal officials to follow leads and obtain an indictment. Thus the indictment was derived in part, directly or indirectly from his immunized testimony. Therefore, the Motion to Dismiss field by defendant Serrano should be granted."

Furthermore, even if the express mandate of Rule 6(e) (3)(c) (iii) transcribed above, had not been incorporated into the Rule the Prosecutor was also bound to follow the Court's Order, because to disregard court orders constitutes "Contempt of Court."

Lawyers are required to obey even incorrect orders, the remedy is appeal. *In Re Dellinger,* 502 F2d 813 Certiorari denied 95 S.Ct. 1425, 420 U.S. 990, 43 L.Ed. 2d 671.

The Supreme Court in *Maness v. Meyers,* 419 U.S. 449, 42 L.Ed. 2d 574, 95 S.Ct. 584 expressed:

> "The orderly and expeditious administration of justice by the courts requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

The Prosecutor was aware of her Contempt of Court and it is particularly enlightening as to this,

when she intentionally "hid" from the Court the fact that there was a Second Grand Jury (See Minutes of the Proceedings dated April 8, 1986 Appendix Pp. 19a-20a.)

> "She further stated that the grand jury is part of the Court system, and that there was only one grand jury dealing with this matter whose foreman was Jose Mariani . . ."

The Prosecutor misguided the Court at that point because she was aware that if the parties discovered that there was a Second Grand Jury, the minutes from that grand jury would show the order that was transcribed therein (See Appendix P. 22a), and her contempt to that order would have been discovered.

Therefore, it can only be concluded that the Prosecutor violated Judge Laffitte's Order which is an illegal act in itself. (Contempt of Court), which can only bring invalid results.

It is a maxim universally recognized by the courts, that acts contrary to the law are null and void.

The Prosecutor, who is part of the executive branch of Government, by modifying a court order has enchroached into the judicial power and has pretended to exercise such power.

The doctrine of Separation of Powers was deemed necessary by the framers of the Constitution for two principal purposes: First, to protect the liberty of the citizen; and Second, to safeguard the independence of each branch of the government and protect it from domination of the other.

The United States Supreme Court has stated in *O'Donahue v. United States,* (1933) 289 U.S. 516, 77 L.Ed. 1356, 53 S.Ct. 740:

> "The Constitution, in distributing the powers of government, creates three distinct and separate departments-the legislative, the executive and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands."

Furthermore, as a result of this unwarranted influence on the Court and the Grand Jury process, the Prosecutor presented to the Second Grand Jury only tainted evidence, and its fruits. Magistrate Castellano's Report and Recommendation Appendix P. 38a:

> "The courts cannot relinquish their supervisory power to pursue effective administration of justice and bolster fair play in criminal prosecutions by allowing the use of *tainted evidence* regardless of the merits of the accusation. Nor can the courts permit "convictions to stand *where indictments are tainted,* and we must satisfy ourselves that prosecutors truly relied upon independent sources *United States v. Zielezinski*, 740 F 2d 727 9th Cir. 1984." (Emphasis provided.)

The testimony of Petitioner Boscio and Co-defendant Tormos were elicited by the misuse of the illegally obtained immunized testimony as they were "subdued" by the government when confronted by that evidence. (See Appendix P. 30a.)

Thus it can be concluded that their testimonies were fruits of the initial illegality and their testimonies were also illegal because the trickery in obtaining the same would bring the question to the court of whether they

were involuntary and a direct violation of the Fifth Amendment Clause of the Constitution.

The doctrine established in *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 84 S.Ct. 1594 has established that the compelled testimony and its fruits cannot be used in any manner by Federal officials and *United States v. Kastigar,* 406 U.S. 441, 92 S.Ct. 1653 "proscribes any use, direct or indirect, of the compelled testimony and any information derived therefrom . . ." this total prohibition on use provides a comprehensive safeguard barring the use of compelled testimony as an investigatory lead and also barring the use *of any evidence* obtained by focusing the investigation on a witness. See *Kastigar,* (Supra).

It is undisputed that the testimonies of Tormos and Boscio were the product of the illegal use of Serrano's immunized testimony, therefore, fruits of that illegality for which reason this testimonies and the sole evidence presented to the grand jury are "fruits of the poisonous tree," thus tainting the indictment against petitioner.

The Government has failed to carry its burden of showing that the information gained from the illegal use of the immunized testimony did not lead, directly or indirectly to the discovery of the facts that were elicited from the two co-defendants and that lead them to the other evidence utilized at the grand jury.

The District Court concedes that the indictment rested exclusively on the immunized testimony of Co-defendant Serrano and dismissed the indictment as to him so the dismissal is proper if the other testimonies were derived therefrom. See: *United States v. Tane,* 329 F2d 848 (1964).

In these circumstances, we think their decisions to testify cannot accurately by characterized as intervening acts of free will of sufficient independence to purge the primary taint of the unlawful use of the immunized testimony. In *Wong Sun v. United States,* 371, U.S. 486, 83 S.Ct. 417, 9 L.Ed. 2d 441 (1963) the Supreme Court established:

> "We need not hold that all evidence is "fruit of the poisonous tree" simply because it would have come to light but for illegal actions of the police. Rather the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to the purged of the primary taint" Maguire Evidence of Guilt, 221 1959. We think it clear that the narcotics were come at by the exploitation of the illegality "and hence that they may not be used against Toy."

Therefore in this case the other testimonies and evidence that were presented to the grand jury have come at by the exploitation of the illegality like in *Wong Sun v. United States,* (Supra) and hence they may not be used against Petitioner Boscio.

Petitioner's due process rights have been violated by the transgretions that have ensured from the acts of the Prosecutor and the investigative Agent and the independence of the constitutionally created grand jury has been disrupted.

This Honorable Court has stated that the grand jury has two principal functions. First, it bears the weighty responsibility of investigating crime and determining

whether there is probable cause to believe that crime has been committed. *United States v. Calandra* 414 U.S. 338, 343, 38 Led 2d 561, 94 S.Ct. 613 (1974). The second, and no less important, task of the grand jury is to "serve the invaluable function in our society of standing between minority group, or other, to determine whether a charge is founded upon reason or dictated by an *intimidating power* or by malice and personal ill will." *Wood v. Georgia,* 370 U.S. 375, 8 Led 2d 569, 82 Sct. 1364 (1962). (Emphasis provided.)

To further the grand jury's investigative function, the grand jury *traditionally has been given wide latitutde in its inquiries. Calandra* (Supra) at 343, 38 L Ed 2d 561, 94 Sct 613. (Emphasis provided.) Judge Laffitte's attempt to give the grand jury that wide latitude in its inquiries was frustrated by the Prosecutors contempt toward his order.

The prosecutors are bound by a few, clear rules which were carefully drafted by the courts and by Congress to ensure the integrity of the grand jury's function. Federal Rule of Criminal Procedure,6(d) is one of such rules; it is designed to guard the secrecy of the grand proceedings, prevent intimidation to jurors, and guarantee that the grand jury is given the opportunity *to make an independent examination of the evidence and render its probably cause and charging determinations free of undue prosecutorial influence. United v. Echols,* 542 F 2d 948 (CA 5, 1976), cert. denied, 431 U.S. 904, 52 Led 2d 387, 97 S.Ct. 1695 (1977). (Emphasis provided.)

The Federal Rules clearly envision that dismissal of the indictment may be an appropriate remedy for such violations of Rule 6(d), See e.g. Federal Rule Criminal Proc. 12(b)(2). Indeed courts have consist-

ently employed the remedy of dismissal of the indictment for deviations from Rule 6(d) which may imperil the grand jury's independence. *United States v. Lill* (Supra.).

So it can be concluded without pre-deciding the case, that here we have a very strong indication of grand jury abuse by the prosecutors that could warrant dismissal independently from innocence or guilt.

The issue pending falls within the "collateral order" exception delineated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 Led 1528, 695 S.Ct. 1221, which states:

> "Such orders must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal for a final judgment."

This situation falls in that class of cases which finally determine claims of rights separable from and collateral to rights asserted in the action too important to be denied review and too independent of the cause itself to require that the appellate consideration be deferred until the whole case is adjudicated. See: *Eisen v. Carlisle & Jackeline*, 417 U.S. 156, 40 Led 2d 732 (1974).

The Prosecutor's conduct has been a violation of Rule 6(d) that has affected the grand jury's independence and has affected the grand jury's charging decision and we have brought this to the attention of the Trial Court as a *pre-trial motion way before the commencement of the trial* which was not set to commence when the motion was filed nor has it been scheduled.

This Honorable Court substantially affected the appealability of issues in criminal cases when it rendered its opinion in *United States v. Mechanik,* 106 S.Ct. 938, 89 L.Ed. 2d 50 (1986).

In *Mechanik,* the defendants asserted, on appeal after conviction, that an irregularity in the grand jury proceedings rendered the conviction void. The defendants did not discover the irregularities until after trial commenced. Defendants moved for dismissal but the district court deferred ruling on the motion until the trial's conclusion. The district court then denied the defendants' motion. The fourth circuit set aside the conspiracy conviction which had been "tainted" by the Rule 6 violation.

In its majority opinion, the Supreme Court assumed that simultaneous presence of the two witnesses violated Rule 6(d) and that the district court might have been justified in dismissing portions of the indictment prior to trial.

The Court held, however, that the supervening jury verdict established that any error in the grand jury proceedings was harmless under Federal Rule Criminal Procedure Rule 52(a). Therefore, reversed of the conviction and dismissal of the indictment were inappropriate:

> "The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but that they are in fact

guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceedings connected with the charging decision was harmless beyond a reasonable doubt."

The Court's majority further expressed:

"We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial.."

The Ninth Circuit most recently on March 11, 1987, decided *United States v. David R. Benjamin, et als.*, 812 F2d 548, (1987) in which the court in a lengthy opinion denies a motion challenging the jurisdiction of the court to entertain an appeal and assumes jurisdiction in deciding a violation of Federal Rules Criminal Procedure Rule 6(d) was appealable as collateral order. The Court stated as follows referring the Supreme Court's opinion in *United States v. Mechanik* (Supra):

"The majority in Mechanik stated "We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of the trial."

This disclaimer means that Mechanik does not automatically apply to our case involving as it does the denial of a pre-trial motion to dismiss.

Nevertheless, we are convinced that we would be failing to accord Mechanik the precedential

effect that is fairly due it if we failed to apply its harmless doctrine to appellants' claims after final judgment. Certainly the harmless error analysis that we have already quoted above would apply; the grand jury's reasonable cause determination would have been mooted by conviction upon a finding of guilt beyond a reasonable doubt. In addition much of the emphasis of the Mechanik majority opinion is on the societal costs of retrial, including witness memory or availability, the possibility that the offender may escape retrial altogether, and delay in the administration of justice that may impede deterrence and rehabilitation.

These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the same proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial. . .

Our conclusion that the district court's order in this case is appealable as a collateral order stems not only from its meeting the technical requirements for an interlocutory appeal, but also from the fact that if no appeal is allowed at this stage, appellants will wholly fail to benefit form the protection of Rule 6(d) imposes on the constitutionally mandated grand jury process. Errors that affected the grand jury proceedings to the detriment of the accused and that would have justified the district court in dismissing the indictment *before trial* won't go wholly unremedied

if the district court itself erred in denying dismissal. We cannot believe that Congress and the Supreme Court intended such ineffectiveness for the Rule.

An interlocutory appeal will prevent that unforward result and Section 1291 is to be given a "practical rather than a technical construction" whether the facts of appellants case justify the remedy of dismissal of the indictment is not to be determined as a threshold test of appealability, but rather a matter for determination when the appeal is heard on its merits." (Emphasis provided.)

The Court of Appeals for the First Circuit dismissed the appeal for lack of jurisdiction stating that the case presented by our allegations is factually more similar to *United States v. Taylor,* 798 F2d 1337 (10th Circuit 1986) which adheres to the principle that disfavours piecemeal appeals following *United States v. Hollywood Motor Car Co.,* 458 U. S. 263, 102 S. Ct. 3081, 73 L.Ed. 2d 754 (1982) and has stated:

"A petit jury determination of guilt will not moot these issues because they go beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment. Accordingly, to the extent they have properly preserved, these issues can be raised upon appeal if the defendants are convicted. See: e.g. *United States v. Hinton,* 543 F 2d 1002 2 Cir. Cert. denied 429 U. S. 980, 97 S.Ct. 493, 50 L.Ed. 2d 589 (1976)."

We respectfully disagree with the First Circuit, because under *Mechanik* (Supra), the Court of Appeals

will be precluded from entertaining an Appeal in the event of a conviction because the petit jury's verdict would have rendered harmless any conceivable error in the charging process.

Thus it is respectfully contend that *Taylor* has interpreted *Mechanik* (supra) without giving it, it's full precendential effect.

We have to look at the precedent established in *Mechanik* to its final consequences and we cannot but conclude that if these issues of prosecutorial misconduct that affect the charging process and violate Rule 6(d) decided before trial when the proper pre-trial motions are presented like we have done in this case, the deferring of a meritorious Rule 6 claim until the close of the trial disposes of it permanently.

> The concurring opinion in *Mechanik* (supra) stated at page 63:
>
> "under today's decision however, deferring a meritorious Rule 6 claim until the close of trial disposes of it permanently. If the movant is acquitted, then his rule 6(d) motion is moot; if the movant is convicted, under the majority's reasoning, then any error was harmless. . .
>
> Under the decision today such rulings cannot be appealed after judgment. Enforcement of Rule 6(d) is thus left to the unreviewable largesse of the district court. We have no reasons to believe that Congress intended Rule 6 to have so little practical meaning.". . . .

Thus the conclusion arrived at the 9th Circuit in *United States v. Benjamin,* (Supra) conforms to the majority's decision in *Mechanik and the District*

Court's decision should be immediately appeallable or otherwise the meritorious claim in practice would have been dispose permanently by the District Court.

We have to conclude in light of the above, that the Order appealed is a final decision within the provisions of 28 U.S.C. 1291 immediately appealable because it falls within the guidelines originally established in Cohen v. Beneficial Industrial Loan Corp. (Supra) and developed through our jurisprudence until the latest available decision, *United States v. Benjamin, et als.* (Supra) for which reasons the Court of Appeals for the First Circuit should have entertained the appeal filed by Petitioner.

Furthermore, the United States Supreme Court in *Pennsylvania v. Ritchie,* decided on February 24, 1987, 55 United States Law Week 4180 upon reviewing its own jurisdiction and reaffirming it's decision in *Mathews v. Elridge,* 424 U.S. 319 (1976) stated:

> "Statutorily created finality requirements should if possible, be construed so as not to cause crucial collaterial claims to be lost and potentially irreparable injuries to be suffered"

It seems that this decision rendered one year after *Mechanik* (Supra) establishes that the Supreme Court's philosophy on this issue is concurring to the Ninth Circuit's as expressed in *Benjamin* (Supra).

This Honorable Court should issue the Writ of Certiorari because under the discretion granted by Supreme Court Rule 17, there are special and important reasons therefore:

First, the Court of Appeals for the First Circuit has rendered a decision in conflict with the Court of

Appeals for the Ninth Circuit; Second, this Honorable Supreme Court should settle the issue whether a pretrial Motion to dismiss for violation of Criminal Procedure Rule 6(d) that affected the grand jury's charging decision is appealable under the "collateral order" exception established in *Cohen v. Beneficial Industrial Loan Corp* (Supra) as a final judgment within the provisions of 28 U.S.C. Section 1291.

VI. CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED.

At Caguas, Puerto Rico, September 17, 1987.

NYDIA MARIA DIAZ-BUXO
Counsel for Petitioner

APPENDIX

APPENDIX

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APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1304

UNITED STATES,

Appellee,

v.

JUAN LUIS BOSCIO,

Defendant, Appellant.

Before
Bownes, Torruella and Selya,
Circuit Judges.

ORDER OF COURT

Entered June 22, 1987

The motion for rehearing is denied.

By the Court:

Francis P. Scigliano
Clerk.

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1304

UNITED STATES,

Appellee,

v.

JUAN LUIS BOSCIO,

Defendant, Appellant.

Before
Bownes, Torruella and Selya,
Circuit Judges.

MEMORANDUM AND ORDER

Entered May 28, 1987

The appeal is dismissed for lack of jurisdiction. The case presented by Boscio's allegations is factually much more similar to *United States* v. *Taylor,* 798 F.2d 1337 (10th Cir. 1986), than to *United States* v. *Benjamin,* 812 F.2d 548 (9th Cir. 1987), and we find the former more persuasive in this instance.

By the Court,

Francis P. Scigliano
Clerk.

APPENDIX III

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1304

UNITED STATES,

Appellee,

v.

JUAN LUIS BOSCIO,

Defendant, Appellant.

ORDER OF COURT

Entered April 21, 1987

Upon review of the record in this case it appears that this court may not have jurisdiction to consider the appeal because the order denying the motion to dismiss is an interlocutory order and is not a final judgment from which an appeal lies.

The appellant is ordered to either move for voluntary dismissal under Rule 42(b) F.R.A.P. or to show cause why this appeal should not be dismissed. The failure to take either action by May 5, 1987 may lead to dismissal for failure to prosecute.

By the Court:
Francis P. Scigliano
Clerk.

APPENDIX IV

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1304

UNITED STATES,

Appellee,

v.

JUAN LUIS BOSCIO,

Defendant, Appellant.

MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

TO THE HONORABLE COURT:

COMES NOW appellant Juan Luis Boscio through his undersigned attorney and respectfully prays, alleges and sets forth:

On May 28, 1987, this Honorable Court dismissed the appeal for lack of jurisdiction stating that the case presented by our allegations is factually much more similar to *United States v. Taylor* 798 F.2d 1337 (10th cir. 1987)

We respectfully disagree because we find upon close analysis of Taylor, (supra) Benjamin, (Supra) and *United States v. Mechanik* 106 S.ct. 938, 82L ed 2d 50 (1986) that Benjamin has given the closest interpretation to Mechanik's effect upon interlocutory appeals. The majority in Mechanik clearly expressed that:

> "We hold only that however diligent the defendants may have been in seeking to discover

> the basis for the claimed violation of Rule 6(d), the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation." (Emphasis provided.)

This Honorable Court has decided that Taylor (Supra) is more similar perhaps on the basis that Taylor, as in our claim, the appeal is brought forth on a Rule 6(d) violation and Benjamin is predicated on a Rule 6(e) violation. But, if we take closer scrutiny to Mechanik, the violation therein invoked by the defendant was a Rule 6(d) violation just like in our case and the Supreme Court, applying the harmless error doctrine stated that petit jury's verdict rendered harmless any conceivable error. Taylor (Supra) adheres to the longstanding principle that disfavors piecemeal appeals following *United States v. Hollywood Motor Car Co.* 458 U.S. 263,102 S ct. 3081, 73 Led 2d 754 (1982) and has stated as follows at page 1340:

> "A petit jury determination of guilt will not moot these issues because they go beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment. Accordingly, to the extent they have properly preserved, these issues can be raised upon appeal if the defendants are convicted. See: e.g. *United States v. Hinton,* 543 F. 2d 1002 2 cir. Cert. denied 429 U.S. 980, 97 S.ct. 493, 50 Led 2d 589 (1976)

In Mechanik (supra) the defendants moved for dismissal on Rule 6(d) violation by the presence of two agents simultaneously at the grand jury. The Court of Appeals for the 4th Circuit reversed the conspiracy convictions and dismissed the conspiracy portions of the indictment holding that the Rule 6(d) violation tainted that portion of the indictment. This opinion was upheld by the court of Appeals after rehearing en banc (756 F 2d 994). The government appealed and the Supreme Court reversed the 4th Circuit

saying as we have previously cited that the petit jury's verdict had rendered harmless any conceivable error in the charging decision.

Benjamin (Supra) stated as follows:

> "The supreme Court in its majority opinion, that the supervening jury verdict established that any error in the grand jury proceeding was harmless under Fed. Crim. P. Rule 52 (a). Therefore, reversal of the conviction and dismissal of the indictment were inappropriate.". . .
>
> Measured by the petit jury's verdict, then any error in the grand jury proceedings connected with the charging decision was harmless beyond a reasonable doubt. Mechanik 106 S.ct. at 941-42. The question before us, then is whether the effect of Mechanik will be to deprive appellants of any affective review of their claim after final judgment. Another way to put this question is to ask whether, after *giving full precedential effect to Mechanik* we would be able to afford appellant any relief if their contentions proved to be meritorious. We conclude that the answer is no.". . . .
>
> "Nevertheless, we are convinced that we would be failing to accord Mechanik the precedential effect that it is fairly due it if we failed to apply its harmless error doctrine to appellant's claim after final judgment. *Certainly the harmless error analysis that we have already quoted above would apply.*" (Emphasis provided.)

For the sake of argument if we assume that appellant goes to trial and a conviction occurs, then this Honorable Court who has adopted the opinion in Taylor (supra) could review Rule 6(d) violations because a petit jury determination according to Taylor will not moot these issues be-

cause they go beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment and this issues can be raised upon appeal if properly preserved.

If this takes place and this Honorable Court reverses for irregularities in the grand jury and undue influence on the grand jury's charging decision, then, the government could appeal under the harmless error doctrine as stated in Mechanik and the Supreme court would reverse this Honorable Circuit Court and sustain the conviction.

Thus it is respectfully contended that Taylor has interpreted Mechanik without giving it, it's full precedential effect beyond the realms of that circuit.

We have to look at the precedent established in Mechanik to its final consequences and we cannot but conclude that if this issue of prosecutorial misconduct that affects the charging process are not decided before trial when the proper pre-trial motions are presented like we have done in this case, the deferring of a meritorious Rule 6 claim until the close of the trial disposes of it permanently.

> The concurring opinion stated at page 63 in Mechanik:
>
> "under today's decision however, defering a meritorious Rule 6 claim until the close of trial disposes of it permanently. If the movant is acquitted, then his rule 6(d) motion is moot; if the movant is convicted, under the majority's reasoning, then any error was harmless. . .
>
> Under the decision today such rulings cannot be appealed after judgment. Enforcement of Rule 6(d) is thus left to the unrevewable largesse of the district court. We have no reasons to believe that congress intended Rule 6 to have so little practical meaning.". . . .

Thus the conclusion arrived at the 9th circuit in *U.S. v. Benjamin* (Supra) conforms to the majority's decision in Mechanik and the District Court's decision should be immediately appeallable or otherwise the meritorious claim in practice would have been dispose permanently by the District Court.

This Court has jurisdiction on Case 87-1103 United States v. Juan Luis Boscio and for the sake of argument had consolidated both appeals.

How can the principle that disfavors piecemeal appeals be disrupted if the Court is considering an appeal already?

Would it not be more practical and economical on the judicial process if the two issue are resolved and the government has not to undergoe the expense of a trial if the charging process will eventually be proven tainted?

Furthermore, the United States Supreme Court in *Pennsylvania v. Ritchie,* decided on February 24, 1987, 55 United States Law Week 4180 upon reviewing it's own jurisdiction stated:

> "Statutorily created finality requirements should if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered" reafirming its decision in *Mathews v. Elridge* 424 U.S. 319 (1976)

It seems that this decision rendered one year after Mechanik establishes that the Supreme court's philosophy on this issue is concurring to the fourth circuit's as expressed in Benjamin (supra).

For the arguments stated in our original motion and the ones herein established, we respectfully believe that this Honorable Court should reconsider its decision dismissing the appeal for lack of jurisdiction.

THEREFORE, we pray from this Honorable court to reconsider its memorandum and order entered on may 28, 1987.

I HEREBY CERTIFY that on this same date copy of this Motion was mailed to AUSA Lydia Lizarribar, Esq. at her office.

Respectfully submitted, on this 3rd day of June, 1987.

Rafael Toro Cuberge, Esq.
Box 66
Yauco, Puerto Rico 00768

Nydia Maria Diaz-Buxo, Esq.
Box 145
Caguas, Puerto Rico 00626

APPENDIX V

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1304

UNITED STATES,

Appellee,

v.

JUAN LUIS BOSCIO,

Defendant, Appellant.

MOTION SHOWING CAUSE WHY THIS APPEAL SHOULD NOT BE DISMISSED.

TO THE HONORABLE COURT:

COMES NOW appellant Juan Luis Boscio through his undersigned attorney and respectfully prays, alleges and sets forth:

This Honorable Court has shown concern as to the jurisdiction of this Honorable Court in the present action particularly on the order denying the motion to dismiss is an interlocutory order and is not a final order from which an appeal lies.

We respectfully disagree and hereby contend that the order appealed is a final judgment within the provisions of 28 U.S.C. Section 1921.

To enable this Honorable court to comprehend the true nature and finality of the order under appeal, we will proceed to establish briefly a set of facts not in the animus of anticipating a decision on the issues to be presented but only to set forth with some clarity the jurisdictional issue and why this Court should concede the appeal and assume jurisdiction.

These facts are as follows:

Defendant Boscio was indicted for the first time on February 1, 1985 by a grand jury presided by Jose Mariani and was subsequently convicted, conviction which is presently on appeal before this Honorable Court.

On October 31, 1985, the day following his sentencing on the first conviction, he was again indicted on extortion charges.

Numerous motions were filed by the several defendants to dismiss the indictment.

Co-defendant Miguel A. Serrano filed a motion to dismiss the indictment on the grounds that his inmunized testimony under local grant of inmunity had been utilized to procure the indictment under the doctrine established in *Murphy v. Waterfront Commission of New York,* 378 U.S. 79, 84 Sct 1954 (1964) and *United States v. Kastigar,* 406 U.S. 441.

The Court disclosed most of the grand jury minutes to determine if the inmunized testimony or any evidence derived from it had been utilized in the indicting process and extensive hearings took place before United States Magistrate J.A. Castellanos.

Once we had access to the grand jury minutes, we made startling discoveries of new evidence that showed that the indicting grand jury had been undully influenced by the prosecutor; that the case Agent had given perjured testimony to procure an indictment against defendant Biscio; that the Prosecutor had intentionally misguided the grand jury so as to prevent them from seeing requested evidence that would have been exculpatory,; the presence of unauthorized persons in the Grand Jury Room, and other instances of undue influence before the grand jury.

Once all this was discovered, several motions have been filed in the District court among which are motions to ask

for a remand from this court, motions for new trial, and or, to expand the record on appeal.

The assistant U.S. Attorney in charge of this case had stated to the Court that there was only one grand jury dealing with this matter. (See Exhibit I. Minutes of proceedings before Magistrate Castellanos, on April 8, 1986 last line of first page and beginning of second page.)

Later, when we were finally granted the grand jury minutes for October 31, 1985, the date of the indictment in the present case, we were once more startled when we discovered that said indictment was the product of a second grand jury because the Jose mariani grand jury, *which conducted the whole investigation* failed to indict for the charges brought in the present case and had expired on April of 1985, more than six months prior to indictment.

It was discovered that Honorable Judge Laffite had given an order under "Miscellaneous" 84-0031 which reads as follows:

> "It is hereby ordered that in presenting to the grand jury presided by Mr. Jose Mariani, empanelled on October, 1983, in connection with its investigation of Miguel Serrano and Shearson American Express, the United States Attorney or his designee *shall read to the grand jury presided by Mr. Edwin Palovani, empanelled* on December, 1984 *the entire transcript of testimony of each witness* with respect to Shearson American Express and others. It is hereby further ordered that this order and pleading filed by the United States in connection with this issuance be and shall remain sealed until further order of this Court. Signed, Judge Hector Laffitte, United States District court." (Emphasis provided.)
>
> See Exhibit II, pages 1 to 4 of the grand jury minute of October 31, 1985 containing Judge laffitte's order.

In spite of this specific order from the Court the Assistant U.S. Attorney in charge of this case only brought to the new grand jury the testimonies of co-defendants Tormos and Boscio and the summary by the Case Agent that brought to the grand jury information derived from Defendant Serrano's inmunized testimony before the local legislature.

On November 21, 1986, Magistrate Castellanos issued a Report and Recommendation recommending that the Motion to Dismiss filed by defendant Serrano should be granted. See Exhibit III, Report and Recommendation; which was later confirmed in an extense opinion by Honorable Judge Cerezo, rendered on April 8, 1987, dismissing Serrano's indictment and establishing that the testimonies before the grand jury had been tainted as being derived from Serrano's inmunized testimony, so that the only evidence brought to this grand jury has been tainted evidence.

There is very strong evidence that the Prosecutor has been not only influencing the grand juries, but has been manipulating the grand jury process as if it was a branch of the United States Attorney's office and has disrupted its independence.

If all the grand jury minutes had been read to the second grand jury and it had the full investigation transferred as ordered by Judge Laffitte, it could have brought different results and perhaps it could have decided not to indict once aware that this defendant had already been indicted and prosecuted for the same issues by the previous grand jury.

ARGUMENT

The United States Supreme Court has stated that the grand jury has two principal functions. First, it bears the weighty responsibility of investigating crime and determining whether there is provable cause to believe that

crime has been committed. *United States v. Calandra* 414 U.S. 338, 343, 38 L ed 2d 561, 94 Sct. 613 (1974).

The second, and no less important, task of the grand jury is to "serve the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon rason or dictated by an *intimidating power* or by malice and personal ill will." *Wood v. Georgia,* 370 U.S. 375, L Ed 2d 569, 82 Sct.1364 (1962) (Emphasis provided.)

To further the grand jury's investigative function, the grand jury *traditionally has been given wide latitude in its inquiries.* Calandra Supra at 343, 38 L Ed 2d 561, 94 Sct 613. (Emphasis provided.) Judge Laffitte's attempt to give the grand jury that wide latitute in its inquiries was frustrated by the Prosecutors contempt toward his order.

The prosecutors are bound by a few, clear rules which were carefully drafted by the courts and by Congress to ensure the integrity of the grand jury's function. Federal Rule of Criminal Procedure 6(d) is one of such rules; it is designed to guard the secrecy of the grand jury proceedings, prevent intimidation to jurors, and guarantee that the grand jury is given the opportunity *to make an independent examination of the evidence and render its probable cause and charging determinations free of undue prosecutorial influence. United States v. Echols,* 542 F 2d 948 (CA 5, 1975), cert. denied, 431 U.S. 904, 52 Led 2d 387, 97 S. ct 1695 (1977) (Emphasis provided.)

The Federal Rules clearly envision that dismissal of the indictment may be an appropriate remedy for such violations of Rule 6(d), see e.g. Federal Rule Criminal Proc. 12(b) (2). Indeed courts have consistently employed the remedy of dismissal of the indictment for deviations from Rule 6(d) which may imperil the grand jury's independence. *United States v. Lill,* 511 F. Supp 50 (SD W.Va 1980).

So it can be concluded without pre deciding the case that here we have a very strong indication of grand jury abuse by the prosecutors that could warrant dismissal independently from innocence or guilt.

The issue pending falls within the "collateral order" exception delineated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 led 1528, 695 S ct 1221, which states:

> "Such orders must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment".

This situation falls in that class of cases which finally determine claims of rights separable from and collateral to rights asserted in the action too important to be denied review and too independent of the cause itself to require that the appellate consideration be deferred until the whole case is adjudicated. See: *Eisen v. Carlisle & Jackeline*, 417 U.S. 156, 40 Led 2d 732 (1974).

The Prosecutor's conduct has been a violation of Rule 6(d) that has affected the grand jury's independence and has affected the grand jury's charging decision and we have brought this to the attention of the Trial Court as a pre-trial motion way before the commencement of the trial which was not set to commence when the motion was filed nor has been scheduled.

The Ninth Circuit has just a few days ago, on march 11, 1987, decided *United States v. David R. Benjamin, et als.*, 812 F2d 548 (1987) in which the court in a very lengthy opinion denies a motion challenging the jurisdiction of the court to entertain an appeal and assumes jurisdiction in deciding a violation of Federal Rules Criminal procedure Rule 6(d) was appealable as collateral order. The Court stated as follows referring the Supreme Court's opinion in *United States v. Mechanik* 89 Led 2d 50 (1986):

> "The majority in Mechanik stated "We express no opinion as to what remedy may be appropiate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of the trial"

This disclaimer means that Mechanik does not automatically apply to our case involving as it does the denial of a pre trial motion to dismiss.

Nevertheless, we are convinced that we would be failing to accord Mechanik the precedential effect that is fairly due it if we failed to apply its harmless doctrine to appeallants' claims after final judgment. Certainly the harmless error analysis that we have already quoted above would apply; the grand jury's reasonable cause determination would have been mooted by conviction upon a finding of guilt beyond a reasonable doubt. In addition much of the emphasis of the Mechanik majority opinion is on the societal costs of retrial, including witness memory or availability, the possibility that the offender may escape retrial altogether, and delay in the administration of justice that may impede deterrence and rehabilitation.

These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the same proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial. . .

Our conclusion that the district court's order in this case is appealable as a collateral order stems not only from its meeting the technical requirements for an interlocutory appeal, but also from the fact that if no appeal is allowed at this stage, appellants will wholly fail to benefit from the protection of Rule 6(d) imposes on the constitutionally mandated grand jury process. Errors that affected the

grand jury proceedings to the detriment of the accused and that would have justified the district court in dismissing the indictment *before trial* won't go wholly unremedied if the district court itself erred in denying dismissal. We cannot believe that congress and the Supreme court intended such inefectiveness for the rule.

> *An interlocutory appeal will prevent that unforward result and section 1291 is to be given a "practical rather than a technical construction" whether the facts of appeallants case justify the remedy of dismissal of the indictment is not to be determined as a threshold test of appealability, but rather a matter for determination when the appeal is heard on its merits."* (Emphasis provided.)

We have to conclude in light of the above that the order appealed is a final decision within the provisions of 28 U.S.C.1291 immediately appealable because it falls within the guidelines originally established in *Cohen v. Beneficial Industrial Loan Corp.* (Supra) and developed through our jurisprudence until the latest available decision which is *United States v. David R. Benjamin, et als.* (Supra) for which reasons this Honorable Court should entertain the appeal filed.

WHEREFORE we pray from this Honorable Court to retain jurisdiction.

I HEREBY CERTIFY that on this same date copy of this Motion was mailed to AUSA Lydia Lizarribar, Esq. at her office.

Respectfully submitted, on this 1st day of may, 1987.

Nydia Maria Diaz-Buxo, Esq.
Box 145
Caguas, Puerto Rico 00626

MINUTES OF PROCEEDINGS
DATE April 8, 1986 BEFORE HON. J. A. CASTELLANOS
COURTROOM DEPUTY Rosie G. Oliver
CASE NO. CR. 85-449 GG
AUSA Lydia Lizarribar
AUSA Salixto Medina

U.S.A.
vs.
JOSE G. TORMOS VEGA, et al
For Defendant(s): Blás Herrero, Esq.
Nydia Diaz Buxó, Esq
Rafael Toro Cubergé, Esq
Harry Anduze, Esq.
Hearing on oral argument called. The following motions were argued and ruled by the court as follows:

Motion Requesting Order for Further Discovery Withheld by the U.S. Government, filed by counsel Diaz Buxó and Toro Cubergé. Counsel Anduze joins counsel Diaz Buxó and Toro for the request of said tapes. The govn't states tapes are part of the discovery in CR. 84-381; there are two transcripts in one tape. The govn't agreed to provide copies of said tapes and the transcripts to counsel. Copies will also be provided to court. Counsel Diaz Buxó stated she would like to hear the original tapes; arrangements were ordered to be made with the U.S. Attorney's office.

Motion to Dismiss for Prosecutorial Misconduct Incorporating memorandum of Law and Request for Evidentiary Hearing, filed by counsel Diaz Buxó and Toro Cubergé argued. Issue of unauthorized persons that were present at the grand jury and to depose foreman discussed. Mag. advised counsel to review minutes of the grand jury. Counsel Anduze states he does not have said minutes. Gov't shall file informative motion to this effect. AUSA Lizarribar states that motions filed by counsel Diaz Buxó were not received by govn't and that copies were furnished this morning by the Magistrate's office. She further stated

that the grand jury is part of the court system, and that there was only one grand jury dealing with this matter whose foreman was José Mariani. Mag. stated there are no new grounds in this motion which was previously filed in Cr. 85-24. Same is denied.

Motion Requesting Decision of Issues, Clarification of Order, Incorporating memorandum, fld. by counsel Diaz Buxó and Toro Cubergé. Counsel Diaz stated that Mag. should have taken judicial notice of translations filed in a previous case. This issue of pretrial publicity was already denied by the court in Cr. 85-24. Counsel is entitled to appeal the mag's decision of April 1, 1986. Counsel Arduze argued that the new trial publicity triggers previous adverse publicity in the other criminal case, and thus revives same as applicable to this action. Thus inhibits clients for having a fair trial. This issue was not brought before the mag. in co-deft's Boscio pretrial publicity motion. The same shall be presented in the appeal to the Judge. The issue of dismissing case for lack of decision was discussed Counsel Diaz indicated she will file motion today to withdraw appeal until mag. rules on the double jeopardy that was still under advisement. Motion to be filed before the Judge.

The issue of Immunity, testimony before Legislature of P. R. discussed. Counsel Herrer requested subpoenas be issued by the Clerk's office to : AUSA Lydia Lizarribar, Criminal Division; AUSA Luis Plaza, Crim. Div., Agent Harry Garcia, FBI, and Luis Feliciano, Chief, Div. of Investigations, Crim. procedure, Dept. Justice, San Juan, P.R. Subpoenas to be issued or hearing of April 14, 1986 at 2:00 PM. at mag. Castellanos courtroom. Mag. and AUSA Lizarribar stated that Deft. Serrano should be present at this hearing. The govn't is provide copy of transcripts of Agent Harry Garcia's testimony in CR. 85-24 at pretrial hear: to dismiss indictment on similar grounds. Counsel Herrero should file stipulation in writing before hearing of Apr. 14 as to issues not in controversy, and

transcripts of hearings before Legislature. Parties to be notified with copy of this Minute.[1]

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[1]Counsel Diaz states in her motion of 4-7-86 (D.E.#139) that there are other issues pending Mag. indicated that since counsel Diaz appealed the double jeopardy under advisement (See Mag. order 3-13-86, p.4, lines 18-20), this matter was removed from his jurisdiction and now pending before the Judge.

GRAND JURY INVESTIGATION

IN THE MATTER OF: MIGUEL SERRANO
SHEARSON AMERICAN EXPRESS

DATE: OCTOBER 31, 1985

TESTIMONY OF: HARRY GARCIA

LYDIA LIZARRIBAR, ASSISTANT UNITED STATES ATTORNEY

MS. LIZARRIBAR: For the record, today is October 31, It is 10:20 in the morning. We are ready to begin with the deliberations and presentation of todays case to this Grand Jury. Our Foreman is not here today. He has been duly excused and we have Mr. Gilberto Feliciano who is going to be our acting foreman. As a mere introduction I would like to state that this is an investigation—

A JUROR: Did he swear in the stenographer?

MS. LIZARRIBAR: We haven't sworn in our court reporter. Will the Foreman please swear in the court reporter.

(Whereupon, the court reporter is duly sworn by the Foreperson of the Grand Jury.)

THE FOREPERSON: We also have 18 members present, so the record can be clear as to that.

MS. LIZARRIBAR: This case has already been presented in the investigation phase to another Grand Jury. It was the Grand Jury of Mr. Jose Mariani whose tenure expired last April, April of this year. As a consequence of that and to be able to present this matter to you, we requested an order from the court authorizing that the investigation be transferred to this Grand Jury.

The order of the court is under the number miscellaneous 84-0031 of Judge Hector Laffitte, and the order was signed yesterday by Judge Laffitte and reads as follows:

"The government having moved the Court pursuant to Rule 631 of the Federal Rules of Criminal Procedure for an order authorizing the office of the United States' Attorney for the District of Puerto Rico to disclose and to read to the Grand Jury presided by Mr. Edwin Palovanni, impanelled on December, 1984, the testimony of witnesses who appeared before the Grand Jury presided by Mr. Jose Mariani, empanelled on October, 1983, in connection with the investigation of Miguel Serrano, Sherason/American Express and others and to disclose and transfer to the control of the Grand Jury presided by mr. Edwin Palovanni, empanelled on December, 1984, material to subpoenaed by Grand Jury presided by Mr. Jose Mariani, empanelled on October, 1983, in connection with that investigation. And good cause having been showed therefore it is hearby ordered that the office of the United States' Attorney for the district of Puerto Rico be authorized to disclose and transfer to the custody and control of the Grand Jury presided by Mr. Edwin Palovanni, empanelled on December, 1984, documentary material subpoenaed by the Grand Jury presided by Mr. Jose Mariani, empaneled on October, 1983 in connection with the investigation of Miguel Serrano and Shearson American Express. It is hereby ordered that the office of the United States' Attorney for the District of Puerto Rico be authorized to disclose and to read to the Grand Jury presided by Mr. Edwin Palovanni, empanelled on December, 1984, the testimony of witnesses who appeared before the Grand Jury presided by Mr. Jose Mariani, empanelled on October, 1983, in connection with its investigation of Miguel Serrano and Shearson American Express and others. It is hereby ordered that in presenting to the Grand jury presided by Mr. Edwin Palovanni, empanelled on December, 1984, the testimony of any witnesses who appeared before the Grand Jury presided by Mr. Jose Mariani, empanelled on October, 1983, in connection with its investigation of Miguel Serrano and Shearson American Express, the

United States Attorney or his designee shall read to the Grand Jury presided by Mr. Edwin Palovanni, empanelled on December, 1984, the entire transcript of testimony of each witness with respect to Shearson American Express and others. It is hereby further ordered that this order and pleading filed by the United States in connection with this issuance be and shall remain sealed until further order by this Court. Signed Judge Hector Laffitte, United States District court."

It was signed on October 30, 1985.

I am going to give the Foreman the order of the judge so he can read it, since it has now become part of our permanent records.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CRIMINAL NO. 85-449CC

UNITED STATES OF AMERICA,

Plaintiff

vs.

MIGUEL A. SERRANO ARRECHE,

Defendant.

REPORT AND RECOMMENDATION

Defendant Miguel A. Serrano Arreche (hereinafter serrano) has filed a motion to dismiss on grounds that the evidence used by the Government to indict and prosecute him in the above case was tainted for using his immunized testimony and information derived from the same. To elucidate the necessary findings of fact, a hearing on Serrano's motion to dismiss was held before the undersigned magistrate on April 14 and 25, May 14 and 22, July 10, August 6, 8, 11, 12, and 18 of 1986.

Through Resolution 946, the House of Representatives of the Commonwealth of Puerto Rico granted Serrano on September 24, 1984, total immunity from criminal and civil prosecution by the Government of Puerto Rico. (Exhibit H).

The immunized testimony given in regard to the so-called Shearson case that was given as a result of said resolution was widely covered by the media and even televised as public hearings by a local TV channel on September 25, 27, and 28 of 1984. Serrano has been subject to other indictments and convicted of related federal charges to other aspects of the shearson investigation not

considered in this opinion which were filed as Cr. 84-381(JP) and Cr. 85-024(GG).

The transcripts of said immunized testimony, which have been thoroughly examined as to reference and information related to the offense charged in this case, Cr. 85-449 for 18 U.S.C. 2, and 1951, as well as video recordings of the televised testimony were obtained by the Federal Bureau of Investigation (FBI), and were available before a Grand Jury returned the present indictment. (Exhibits D, E, and O).

In addition, as a result of the same, codefendants Tormos and Boscio subsequently testified before the Grand Jury and also provided various statements to the FBI. Although in the overt acts set forth in the indictment any mention to the "Florida Festival" meeting was avoided, codefendants provided, in particular, information to the Grand Jury as to this meeting where the alleged conspiracy was hatched. (Exhibits K, L, N, 7 and 8. See also Grand Jury transcripts of 1/17/85). Knowledge of this meeting was disclosed for the first time through Serrano's immunized testimony and thereafter by codefendants Boscio and tormos after being approached by the FBI. These events, together with the totality of other evidence discussed hereinafter, attune with the FBI's actions prior and during the Grand Jury hearing caused to charge defendant Serrano for the aforesaid offenses. The alleged charges and the ensuing indictment for "kickbacks", are thus tainted.

Once Serrano had established that he has testified under a state/legislative grant of immunity to matters related to federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted. *Murphy* v. *Waterfront*, 378 U.S. 52 at 79, 84 S. Ct. 1594 at 1609 (1964). Thus, there being a prima facie case that defendant's immunized testimony was available to the federal officers and somehow used by the Government to

procure an indictment, the necessary showing was present to allow disclosure of grand Jury minutes. The prosecution submitted these as evidence to defeat defendant's proposition that the indictment was in fact tainted.

The privilege against self-incrimination is deeply rooted in our justice system of fair play which dictates that notwithstanding law enforcement considerations "an individual be left alone until good cause is shown for disturbing him and requires the Government in its contest with the individual to shoulder the entire load". 8 Wigmore, *Evidence* (McNaughton rev. 1961) at 317. The privilege is also grounded in a realization that although sometimes it may "shelter the guilty", is often "a protection to the innocent". *Quinn* v. *United States*, 349 U.S. 155, 75 S. Ct. 668 (1955).

It is embedded in our legal system of constitutional values that the protection ensued by the privilege against self-incrimination must be sustained in this type of cases regardless of the high social value of letting guilty person go unpunished. Under this analysis of fair play the Government should remain in the same position it would have been if the incriminating statements had never occurred. *Nix* v. *Williams*, 467 U.S. 431, 104 S. Ct. 2501 (1984).

The Supreme Court holding that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal, as well as state law, is well settled. In consequence, a state witness may not be compelled to give testimony which may be incriminating under federal law "unless the compelled testimony and its fruits cannot be used in any manner by federal officials" in connection with criminal prosecution against him. *Murphy* v. *Waterfront*, supra.

This grant of local immunity would not prevent the Federal Government from prosecuting defendant Serrano in this case, but certainly places a restriction as to the sources

of evidence it may use, as if he had been granted federal use immunity. 21 *Am. Jur. 2d, Criminal Law,* §210.

Likewise, the interpretation of the use immunity statute "proscribes any use, direct or indirect, of the compelled testimony and any information derived therefrom. . ." *United states* v. *Kastigar,* 406 U.S. 441, 92 s. Ct. 1653 (1972). This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead, and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Kastigar,* supra, 406 U.S. at 460, 92 S. Ct. at 1664. See also *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli,* 82 Yale L. J. 171 (1972); *Recent Development, Disclosure and Civil Use of Immunized Testimony,* 35 Vanderbilt L. Rev. 1211 (1982).

Thus, the Government has the burden of establishing that all of the evidence presented to the Grand Jury and all the evidence to be used at trial was derived from legitimate, independent sources. *United States* v. *Hampton,* 775 F. 2d 1479 (11th Cir. 1985); *United States* v. *Byrd,* 765 F. 2d 1524 (11th Cir. 1985); *United States* v. *Gregory,* 730 F. 2d 692 (11th Cir. 1984). The Government shall prove independent evidence source by preponderance of the evidence. *United States* v. *Seiffert,* 501 F. 2d 974 (5th Cir. 1974). In the case at bar the Government has failed to do so.

The a posteriori effort to trace the evidence presented to the Grand Jury and/or under the agent's custody prior to defendant Serrano's immunized testimony as obtained from wholly independent sources contravenes logic and inference under the findings of fact made in this report.

There is certain evidence related to this case which was available to the FBI prior to Serrano's immunized testimony, namely: subpoenas as to the overall Shearson investigation, related to Cr. 84-381 were issued as far back

as March 16, 1984, (Tr. 8/12/86, p. 17, lines 10-24); a civil complaint which made reference to some payment that was split between codefendants had been filed by Francisco Pujols, a Shearson executive, by March of 1984, (Exhibit 10, p. 33); copies of money orders had been obtained from the Federal Home Loan Bank, (Tr. 8/11/86, p. 140, lines 9-25). The Government also submitted a memorandum to the Secretary of the Treasury as evidence of independent sources. (Exhibit 11, pp. 24-26). As to Exhibit 12 that includes numerous news articles, these, after reading them, mostly reiterate the general averments in Pujol's complaint. See also, Tr. 8/12/86, p. 19, lines 13-25; p. 20, lines 1-19; p. 23, lines 14-22; p. 34, lines 5-9; pp. 43-44; and Tr. 8/18/86, p. 6, lines 9-15; p. 7, p. 14, lines 7-11; p. 18; p. 19, lines 13-15, p. 20.

Agent Garcia's testimony before this magistrate further disclosed:

> ". . .at that time I didn't know at that time that I had all the evidence or information, everything. It is just that I had all of these documents to go over at that point. . ." (Tr. 8/12/86, p. 36, lines 11-16; and p. 55).
>
> ". . .I was ready on the first case and on the second case, that I had practically all the evidence in this case right here . . . of course I needed to interview although I had the information. (Tr. 8/12/86, p. 98, lines 21-25. See also p. 99, lines 1-9).

On the above issue the statements of local prosecutor Francisco San Miguel in charge of the Shearson investigation for the Commonwealth of Puerto Rico, is enlightening:

> "When the hearing started, it was a very important part of the case when Mr. Serrano testified because one thing is to investigate looking

> at documents and trying to find out what had happened and another is to hear a person telling all the transactions and how they occurred. It was very significant." (Tr. 8/8/86, p. 18, lines 12-19).

Even if some evidence was available to the case agent prior to Serrano's testimony, the existence of such disperse evidence does not necessarily provide the investigative agents the necessary link to prove defendant's participation in this particular offense and the conspiracy charged. It is more likely than not that the lead required was obtained through the immunized information. The investigators had never heard of the "Florida Festival" meeting prior to said testimony, which allowed the verification of the identity of the alleged co-conspirators. This subsequently subdued codefendants Boscio's and Tormos' disposition and motivation to provide statements upon the agent's requests, as well as their testimonies before the Grand Jury. Hence, these codefendants' inclination to testify before the Grand Jury upon approach of the case agent cannot be isolated from the factors that convinced them to cooperate. *United States* v. *Kurzer*, 534 F. 2d 511, 517 (2d Cir. 1976).

As to the "Florida Festival" matter the FBI Agent Garcia testified before the Grand Jury on October 31, 1985. He mentioned that "Serrano also testified before the local Senate indicating the same things" as to $220,000 "kickback" payment to codefendant Tormos Vega. (Tr. 5/14/86, p. 12, lines 7-18. See also Grand Jury minutes of 10/31/85, Exhibit 5, pp. 11-12).

Agent Garcia also referred to this same issue in Cr. 85-024 at a hearing on Serrano's motion to dismiss on similar grounds.

MR. HERRERO:

"I quote form page 77 of the transcript of Mr. Garcia in the motion to dismiss before Judge Gierbolini. Question, "But the fact of the matter"—this is a question by Mr. Herrero, your servant, this attorney."

"But the fact of the matter is that everything in relation to the Florida Festival, you first received knowledge about it from Serrano's testimony before the Legislature"?

Answer, "I believe so." Question, "What"? Answer, "I believe so." (Tr. 5/14/86, p. 13, lines 6-17).

Codefendant Tormos was contacted for interview with the FBI on October 3 and 4 of 1984, some 10 days after Serrano's immunized testimony related his participation in the scheme charged herein. (Tr. 8/11/86, p. 50, lines 7-10; p. 55, lines 8-21, and Exhibits J and K - FBI's 302 forms).

Upon request of FBI Agent garcia codefendant Tormos was advised about the events concerning allegations of "kickbacks" received while he was mayor of Ponce made by Serrano during his immunized testimony. (Tr. 8/11/86, p. 63, lines 19-25; p. 64, lines 16-18. See also Tr. 8/11/86, p. 62, lines 10-25; p. 63, lines 1-11; p. 103, lines 4-25; p. 104, lines 1-14; p. 117, lines 2-18; p. 126, lines 10-24; p. 127, lines 1-4; p. 133, lines 19-25).

"Q So you send the request to interview Tormos Vega to the Tampa office?
A That is correct.
Q And why did you want him interviewed?
A I had him contacted to see if he would he willing to speak to the FBI referring to the allegations that were made.
Q What allegations?
A The allegations of kickbacks.
Q Who made those allegations?

A Mr. Serrano.
Q Where?
A At the hearings.
Q What hearings?
Q Hearings at the Senate."
(Tr. 8/11/86, p. 67, lines 6-20).

The testimonies provided to a former Grand Jury by codefendants Tormos and Boscio were read to the grand jurors in the case at bar. (Tr. 8/11/86, p. 14; p. 19, lines 22-25; p. 39, lines 1-25).

Agent Garcia also recognized that the source of the information presented to the Grand Jury on January 17, 1985, pp. 19-20, was obtained from the Senate hearings and from codefendant tormos' statements. (Tr. 8/11/86, p. 83, lines 8-11). An official court reporter, Fernando Altamirano, initially upon request of Attorney Salvador Antonetti, Shearson's counsel, had copied and transcribed from Meléndez Berrios, Serrano's immunized testimony. FBI Agent Garcia requested and paid for copies of transcript and translation made by Altamirano. (Tr. 8/6/86, pp. 9-19). Although the above certified transcripts of Serrano's testimony was not available until June or July, 1985, the FBI had the benefit of the transcript made from the FBI videorecording of the same. (Tr. 8/11/86; p. 85, lines 6-13; p. 87, lines 22-25).

It was highly relevant to notice that Exhibit O, the FBI partial transcript referred above, deals mainly with the portion of Serrano's testimony in regard to the issue of "kickbacks". (Exhibit O, pp. 23-41, pp. 48-64). The Senate hearing which consists of 303 pages in Spanish, discloses this same testimony starting on page 227. (Exhibit D).

In addition, contrary to the situation in McDaniel, the agent's report in this case was not prepared nor available to the prosecution before the defendant had testified under legislative immunity. Although a general allegation was made that the investigation had been concluded and the

case ready to be submitted to the Grand Jury prior to said testimony, the evidence at such time was not certified or sealed, turning the issue into a joust on credibility and reasonable inferences. *United States* v. *McDaniel,* 482 F. 2d 305 (8th Cir. 1973).

The prosecuting attorney in the case at bar testified not having read or examined the transcripts of the immunized testimony nor having seen the televised public hearings of defendant's testimony. Neither did she was invited to participate in the initial meeting held between the defendant, his attorney, Attorney Marcos Ramirez, Special Counsel for the House of Representatives, and the U.S. Attorney at the latter's office where it was mentioned a possible *Waterfront* problem. In addition, the guidelines established by the Department of Justice to Compel Testimony were not available at the office. The prosecuting attorney wa detached from the controversies presented herein and exercised the most common sense values by isolating herself from such publicized issue.

The necessary control as to the law enforcement agent's actions in regard to in-depth examination of defendant's immunized testimony was absent. More so since no agent report had been rendered to the prosecution until mid-1985, that is, some four months after the testimony under immunity had been televised, transcribed, and read on numerous occasions by the agent in charge. Agent Garcia's subsequent participation in the evidence gathering process before the Grand Jury and his interviews with witnesses after the immunized testimony was given is unsurmountable. It is evident that Agent Garcia assisted in the subpoena of witnesses before the Grand Jury and was the assigned agent to present the case before the Grand Jury. He also briefed other agents as to interviewing potential witnesses after defendant had testified, and among others, prepared the exhibit list for the prosecution in this case. The evidence presented during the extensive hearings on the motion to dismiss clearly demonstrates that the case

agent continued to investigate the case and follow leads with the benefit of the defendant Serrano's immunized information. A serious doubt was raised as to why it took 11 months to present to the Grand Jury a case that was allegedly completed. This is aggravated by the fact of all the efforts made to obtain the transcripts and translation of Serrano's testimony before the Legislature and reading the same three or four times.

The testimony of U.S. Attorney López Romo revealed that after the meeting of September 7, 1984, prior to Serrano's testimony, federal authorities well knew a "Waterfront" situation might arise. This testimony also showed a concern to clarify and preserve all the evidence that may have been obtained before Serrano would testify and some instructions were given to that effect. (Tr. 8/12/86, p. 86, line 25; p. 87, lines 1-4). However, these instructions were not followed. No corrective measures were considered probably on a generalized belief that: showing the grand jurors the immunized testimony would be proper, (Tr. 8/12/86, p. 96, p. 97, lines 1-17); a continuous mutual cooperation between federal and state authorities before and subsequent to immunity existed, (Francisco San Miguel, Asst. District Attorney for the Commonwealth, Tr. 8/8/86, pp. 15-18, p. 19, lines 4-16; pp. 27-28); there was no violation to immunity agreement to disclose testimony for being a public record, (Atty. Meléndez Berrios, State Prosecutor, Tr. 8/6/86, p. 56, lines 24-25; p. 57, lines 18-25; pp. 58-59).

Failure to take any possible precautionary measures in regard to prosecution subsequent to Serrano's immunized testimony by state and federal authorities involved was premised on a belief that since the testimony was televised it became a sort of public record (Tr. 8/16/86, p. 55, lines 1-2; p. 56, lines 15-25; pp. 58-59; p. 60, lines 21-20.) If this reasoning prevails a mere decision to make public any portion or information of a person's immunized testimony, with or without knowledge or consent of the party af-

fected, would be sufficient to subdue any allegation of Fifth Amendment privilege and use immunity. The requirement of independent source for evidence would be vacated by anyone's determination to make public or available any information given under immunity.

Other districts have acknowledged that the mere reading of testimony under immunity by the prosecuting attorney taints the proceedings against a defendant. Although such a drastic reasoning has not been adopted herein, it certainly should have apprised the Government that a careful scrutiny and control must be required when this type of situation is foreseen. Cf. *United States* v. *Tantalo,* 680 F. 2d 903 (2d Cir. 1982); *United States* v. *Beery,* 678 F. 2d 856 (10th Cir. 1982); *United States* v. *Anzolone,* 555 F. 2d 317 (2d Cir. 1977); *United States* v. *Nemes,* 555 F. 2d 51 (2d Cir. 1977); *Golberg* v. *United States,* 472 F. 2d 513 (2d Cir. 1973); *United States* v. *Mitchell,* 384 F. Supp. 562 (D.D.C. 1974); *United States* v. *Dornan,* 359 F. Supp. 684 (S.D.N.Y. 1973).

The Department of Justice has drawn its attention to these measures as set forth in the *Guidelines Relating to use of Statutory Provisions to Compel Testimony of Information* (Jan. 14, 1977). In addition, notice has been given to the matter through H.R. 94 before the Sub-committee on Immigration, Citizenship and International Law of the House Commission on the Judiciary, 95th Congress, First Session (1977), as addressed upon by the Attorney General Civiletti on said date. W. LaFave & J. Israel, 1 *Criminal Procedure,* Sec. 8.11 (1984).

As in *Hampton,* Agent Garcia in this case had no special procedure or instruction to shield himself or those agents that in some manner participated in the investigation from the immunized testimony nor any efforts were made to do so. Therefore, the prosecutor had to heavily rely on the agents' summaries, briefing and appreciation of the case and evidence obtained.

It is logic to infer that Agent Garcia used the immunized information as a leverage to obtain the testimony, interviews, admissions of and documents brought by other witnesses who testified before the Grand Jury by "whipsawing" one witness to testify against another as proceeds of the Serrano's immunized testimony. *United States* v. *Romano,* 583 F. 2d at 9.

The Government did not introduce any evidence that the indictment to which codefendants Boscio's and Tormos' testimonies contributed was not due to Serrano's immunized testimony, and thus wholly independent from said immunity. The use of immunized testimony as a basis for subsequent questions propounded to a witness constitutes impermissible derivative use of immunized testimony. *Pillsbury* v. *Conboy,* 459 U.S. 243, 103 S. Ct. 608 (1983).

The question of whether any use, derivate or otherwise, was made of the compelled testimony by the prosecution, is one of fact and shall be set aside only if clearly erroneous. *United States* v. *Romano,* 583 f. 2d 1, 7 (1st Cir. 1978); *United States* v. *Jobin,* 535 F. 2d 154, 156 (1st Cir. 1976).

There is not doubt that the identity of codefendants Boscio and Tormos was known to the agents before defendant Serrano testified under immunity. They were by then targets of the investigation. It is reasonable to conclude that Serrano's immunized testimony contributed to codefendants Boscio's and Tormos' decision to rebut the information provided as to the events, prompted by Agent Garcia's request to interview them.

The testimonies presented at the hearing before this magistrate by the prosecution did establish that federal agents knew certain aspects of the transactions executed by defendants prior to Serrano's immunized testimony. However, it did not convincingly establish an independent source for each item of evidence presented to the Grand Jury nor met the burden to establish by preponderance

the source of its evidence from the outset of its investigation as to this particular offense. The prosecution submitted a statement from Francisco Pujol dated 1983 to show independent source for evidence as to the offenses charged herein. Exhibit 5, p. 12; Exhibit 9. Notwithstanding, this statement was not offered in evidence as to its content nor the truth or veracity of the same but merely as indication of its existence. There is no indication that either Pujol or the statement, if relevant, was ever submitted to the Grand Jury. Neither can it be inferred from the evidence presented that it is related to the offenses charged in the indictment, and as such lacks any evidentiary value.

The courts cannot relinquish their supervisory power to pursue effective administration of justice and bolster fair play in criminal prosecutions by allowing the use of tainted evidence regardless of the merits of the accusation. Nor can the courts permit "convictions to stand where indictments are tainted, and we must satisfy ourselves that prosecutors truly relied upon independent sources". *United States* v. *Zielezinski,* 740 F. 2d 727 (9th Cir. 1984).

The above findings of fact are adequate to sustain a determination that the Government did not defeat the proposition that Serrano's immunized testimony was used by federal officials to follow leads and obtain an indictment. Thus, the indictment was derived in part, directly or indirectly from his immunized testimony. Therefore, the motion to dismiss filed by defendant Serrano should be granted.

IT IS SO RECOMMENDED.

The parties have ten (10) days to file any objection to this report and recommendation. Failure to file objections within the specified time waives the right to appeal the order. *United States* v. *Valencia,* 792 F. 2d 4 (1st cir. 1986).

San Juan, Puerto Rico, November 21, 1986.

J. A. CASTELLANOS
United States Magistrate

APPENDIX VI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Cr. No. 85-449 (*CC*)

UNITED STATES OF AMERICA
PLAINTIFF

VS

JUAN LUIS BOSCIO ET ALS
DEFENDANTS

APPEAL AND MEMORANDUM

TO THE HONORABLE COURT:

Comes now Juan Luis Boscio, through the undersigned Counsels and respectfully states, alleges, appeals and set forth as follows;

1) The defendant Juan Luis Boscio, hereby appeals the oral denial of our *Motion To Dismiss* dated June 11, 1986, (docket entries #182, 183); Exhibit 1, Oral Argument dated November 10, 1986, page 62, lines 5 - 12; page 65 lines 13-20, page 66 lines 21-25. The appeal is being taken without the benefit of a written Report and Recommendation by the Magistrate since the Magistrate instructed the undersigned to proceed without the written Order of the Magistrate (page 66 lines 17-25, Exhibit 1).

2) The grounds for the appeal are hereby set forth as follows:
   a) The Government requested an Order under the Miscellaneous 84-0031 (HL) pursuant to Rule 6(e)(3)(c)(iii) of the Federal Rules of Criminal Procedure for an Order authorizing the United States Attorney for

the District of Puerto Rico to disclose and to read to the Grand Jury presided by Mr. Edwin Palovanni empanelled on December 1984 the testimony of witnesses who appeared before the Grand Jury presided by Mr. Mariani and empanelled on October 1983 in connection with the investigation of Miguel Serrano, Shearson/American Express and others. . ." (Exhibit I, page 52-53, lines 19-25; lines 1-24; Exhibit II and Exhibit III). Furthermore, the Order reads:". . . the United States Attorney or his designee shall read to the Grand Jury presided by Mr. Edwin Palovanni, empanelled on December 1984 the *entire transcript of testimony of each witness* with respect to Shearson/American Express and other." (Exhibit I, page 54 lines 19-23, emphasis ours) See also Exhibit II). The body of the Order entered by the Hon. Laffitte is transcribed on pages 52, 53, 54, 55 Exhibit I and is also included from the Miscellaneous 84-0031 as Exhibit II.

The shearson/American Express investigation dealt with Cr. 84-381 (JP) Cr. 85-0024 (GG) and the present Cr. No. 85-449 (CC). Defendant Boscio contention and issue raised in our Motion to Dismiss (docket entry #182, 183) was whether or not the Order given by Honorable Laffitte to take all the Grand Jury minutes, testimonies, materials to the other Grand Jury was followed or was not followed; whether or not the order given by Honorable Judge Laffitte to take all the Grand Jury minutes, testimonies materials to the other Grand Jury was followed or was not followed whether the decision was complied or not comply with. Defendant Boscio understands that said Order was not complied with by the Government; that only selected documents were read to the Grand Jury and that said selection of documents mislead the grand jurors in detriment of defendants in the present case; and hence, the Order entered by the Hon. Judge Laffitte was not followed by the Government in contempt of said Order. Said con-

tempt is in fact a manipulation of the grand jury as a vehicle to find probable cause and grand jury indictments for the same facts and evidence which had been previously investigated by a previous Grand Jury.[1] All this without the benefit of several Grand Jury witnesses not presented to the second Grand Jury in contempt of said Order. Therefore, the remedy in the present case is dismissal.

The Government failed to opposed our Motions on due time (docket entries #190) later on an untimely, filed their opposition (docket entrie #192, 193) the Magistrate requested an opposition by the Government after the opposition had already been filed (docket entries unnumbered after 197(c) dated September 9, 1986)[2], the Plaintiff informed the Magistrate that the opposition was filed (docket entry 203), the Government filed a new opposition (docket entry #205) and the Magistrate set the Motion for Hearing as to November 10, 1986. The Government contends on their Motion dated September 19, 1986, page 2-3 (Exhibit 1, page 16, lines 11-20) docket entry # 205 ". . . that only selected testimony were read to the Grand Jury; all pertinent transcripts were read in compliance with the order.

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[1]See Exhibit IV, Grand Jury Minutes of January 17, 1985, testimony of Harry Garcia, pages 13-21 which is a clear example of material withheld from the second Grand Jury. See Exhibit V, Grand Jury Minutes of February 1, 1985, testimony of Harry Garcia presented to the first Grand Jury which was presented as evidence to influence the first Indictment by making the Grand Jury believe that defendant Boscio had acquired benefits from the transaction that caused that Indictment which was one year prior to the alleged occurrence. (See original Motion, docket entry #183). It was of material importance to the Second Grand Jury to see that defendant Boscio had already been placed in jeopardy by the that defendant Boscio had already been placed in jeopardy by the same material facts.

[2]The docket, in the present case, page 10b is not in serial sequence, indeed, there are several documents unnumbered, or numbered with letters like 197,197a, an unnumbered entry, of transcript, 198, an unnumbered entry, 199,197b, 197c, six unnumbered entries and 200. The same fashion is observed in several other pages of the docket.

If counsels is refering *to all the transcripts of the Shearson investigation,* then she is correct, *not all were read.* "Furthermore, at the oral argument, page 34, (Exhibit 1) lines 22-24, Ms. Lizarribar, Assistant U.S. Attorney further stated that the Government's positions is that "That matters that were finished, there is no need to transfer them, they were finished they had bee indicted." However, otherwise was alleged by Ms. Lizarribar when the Government sought and pleaded for Hon. Laffitte's Order. See Exhibit III, paragraphs 3,5 whereby the U.S. Attorney subdued Judge Laffitte for the Order, stating that two indictments has already resulted, investigation near completion and motion made in good faith, with an interest of achieving judicial economy and serve the best interests of justice in that a complete factual scenario would be presented to the Grand Jury for consideration during a determination of probable cause to return a true bill. "As to this position, defendant Boscio also contends that the Hon. Laffitte was deceived to consenting to a transfer of the material form one Grand Jury to another since he was made to believe that everything was to be transfer to the new Grand Jury" as to present the complete factual scenario" when in fact, the true intention was to have all materials at hand but for a fishing expedition into that materials for selected testimonies and materials in order to mislead the Grand Jury to indict and to eliminate any doubts the first Grand Jury would have shown. It so happens that the only testimony chosen by AUSA Lizarribar to bring to the second Grand Jury is precisely Tormo's and Boscio's tainted testimonies making more significant the intentional violation of Judge Laffittee's Order. Further, as to this point, defendant Boscio contends that the Order of Hon. Laffitte doesn't make any distinction between the evidence of matters finished and matters on the way, and that among the so-called matters finished are included the testimony of Agent Harry Garcia on the same matters under way. Further still, defendant Boscio con-

tends that said abrogation of making distinctions as to the evidence and materials to be transfer from the Grand Jury to another is contempt to the Order of the Court which is clear:". . . the United States Attorney or his designee *shall read* . . . the entire transcript of testimony of each witness with respect to Shearson/American Express and others" and whether the matters were finished; indicted or not was never addressed to the Court and the Order is so clear that needs no further clarification; wherefore, the advise of the Hon. Magistrate to go to seek clarification to the Hon. Laffitte is misleading to the best of our knowledge and believe (See Exhibit I, pages 55,56,59,60,61).

The Magistrate's position is that he fails to see any misconduct (Exhibit I, pages 36,37,38). The position is incomprehensible to defendant Boscio and his Counsels, since the misconduct is all over the record, repetitive and of such grievious fault as to lead the Court into error continuously. Indeed, defendant Boscio alleged in our Motion To Dismiss that AUSA Lizarribar intentionally and expressly told U.S. Magistrate Jesus Castellanos that there was only one Grand Jury and that the different forepersons in 85-024(GG) and in 85-449 (CC) was apparently due to the fact that Mr. Mariani, the foreman, was absent the day of this Indictment on October 31, 1985. See Minutes, April 8, 1986, included herein as Exhibit VI. This lie was well known to be misleading when AUSA Lizarribar misrepresented the truth to the Magistrate. She was the same prosecutor who sought the disclosure of testimonies and transfer of documentary evidence during the Shearson/American Express investigation by one Grand Jury to the other in "good faith"; and in the same spirit and "good faith" stated to Magistrate Castellanos that the reason for the different forepersons was apparently due to the fact that Mr. Mariani was absent on the day of the Indictment since only one Grand Jury dealt with the Indictment. With all respect, to lie before the Honorable Court is misconduct

and to mislead the Court with false statement or half truths is grievious misconduct and to select the testimonies in order to get an Indictment is to taint with the Grand Jury. The Grand Jury as well as the Magistrate Castellanos were in their right to know that two Grand Juries had dealt with the same facts, evidence and witnesses and that not all the witnesses or their testimonies were read to the second Grand Jury in violation of the Hon. Laffitte's Order.

3. Furthermore in his report and recommendation of November 21, 1983 Hon. Magistrate Jesus Castellanos concluded that the indictment is tainted because of the use of Miguel Serrano's inmunized testimony before the commonwealth's Legislative and that Defendant Tormos and Boscio were Subdued to testify through the inmunized testimony thus making their testimonies before the grand jury tainted. (See page 7 to 10 of said Report and Recommendation).

It so happens that the only testimony chosen by AUSA Lizarribar to bring to the new grand jury is precisely Tormo's and Boscio's tainted testimonies making more significant the intentional violation of Hon. Judge Laffitte's Order.

The Grand Jury had before tainted evidence and a summary by agent Harry Garcia all of which makes the determination to the Grand Jury null and void thus producing a tainted indictment for which reason this Honorable Court has no jurisdiction.

The absence of an indictment is a jurisdiction defect which deprives the Court of its power to act, such a jurisdictional defect which deprives the Court of its power to act, such a jurisdictional defect cannot be wained by a defendant error by a plea of guilty. *Smith v. United States* 360 U.S. 10, 79 sct 997.

See also *United States v. Mackin* 523 F2d. 193 (1975), *United States v. Fein* 504 F.2d 1170 (1974), *United States v.* Kilpatrick 594 F. Supp 1324 (1984).

The United States Supreme Court has most recently decided in *Vazquez v. Hillery* 106 S. Ct. 617 (1986), that:

> "In the hands of the grand Jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single Count; and perhaps most significant of all a capital offense or a nom capital offense-all on the basis of the same facts. Moreover the grand jury is not bound to indict in every case where a conviction can be obtained. . . ." "The overriding imperative to eliminate the systematic flaw in the charging process, as well as the difficulty of assessing its effect on a given defendant requires our continued adherence to arole of nadatory reversal. . . ."

In our case the grand jury is tainted not only because tainted evidence was brought in to it but also because the charging process was manipulated and all the evidence that had to go before that body according to the Judge's order was excluded which is and improper intrusion by the prosecutor in the functions of the grand jury.

The acts of the prosecutors are not only misconduct but also a violation of 18 U.S.C. 401 which is contempt of court. Conduct lacking vituperation violence or physical force may be found abstractive and flauting a Court's commond may in fact be the essence of abstracting administration of Justice *U.S. v. Thoreen* 653 F.2d 1332 (1981). Lawyers are required to abey even incorrectorders; the remedy is appeal. *In Re Dellinger* 502 F. 2d. 813 certiorari Denied 95 S.Ct. 1425, 420 U.S. 990, 43 led. 2d 671. (See Exhibit III).

Criminal contempt is established when there is a clear and definite order and the contemnor knows of the order

but but willfully disobeys the order. *Chapman v Pacific Tel and Tel* Co. 613 F2d 193 (1979).

The orderly and expeditious administration of Justice requires that an order issued by a court must be obeyed by the parties until it is reversed by orderly and proper proceedings *Maness v Myers* (1975) 419 US 449, 42 L.Ed 574.

The AUSA in this case knew of the order which was obtained by her pleadings which made Judge Laffitte believe that a good faith attempt was made by the U.S. Attorneys office to present *a complete factual scenario* to the new grand jury (see Exhibit III) But as it resulted the intentions were different. The Prosecutor had decided that only selected materials would be taken to the second grand jury. The hidding of the existence of a second grand jury as narrated preceedingly on pages 6 and 7 of this Motion, undoubtedly shows that her acts were intentional but defendants would not be awared because generally grand jury minutes are not obtained to the defense.

Therefore, it can only be concluded that the prosecutor violated Judge Laffitte's Order which is an ilegal act (contempt) and that an act contrary to the law can bring only invalid results. Thus the resulting indictment is the consequence of acts contrary to the law which make it *null and void* and devoids this Honorable Court of jurisdiction.

Wherefore, we pray from this Honorable Court to dismiss the indictment.

Respectfully submitted on this 29th day of December 1986

I hereby certify that on this same date copy of this Motion and Exhibits were delivered to AUSA Lydia Lizarribar, Mr. Blas C. Herrero Jr. and M. Harry Anduze to their addresses of record.

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UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

MISCELLANEOUS NO. 84-0031 (HL)

IN RE:

MIGUEL A. SERRANO
SERRANO/SHEARSON, AMERICAN
EXPRESS et. al.

ORDER

The Government having moved the Court, pursuant to Rule 6(e)(3)(c)(iii) of the Federal Rules of Criminal Procedure, for an Order authorizing the Office of the United States Attorney for the District of Puerto Rico to disclose and to read to the Grand Jury presided by Mr. Edwin Pavoani, impanelled on December, 1984 the testimony of witnesses who appeared before the Grand Jury presided by Mr. Jose Mariani, impanelled on October, 1983 in connection with its investigation of Serrano/Shearson, American Express et al., and to disclose and transfer to the custody and control of the Grand Jury presided by Mr. Edwin Pavoani, impanelled on December, 1984 materials subpoenaed by the Grand Jury presided by Jose Mariani, impanelled on October, 1983 in connection with that investigation, and good cause having been shown therefore,

IT IS HEREBY ORDERED that the Office of the United states Attorney for the district of Puerto Rico be authorized to disclose and to read to the Grand Jury presided by Mr. Edwin Pavoani, impanelled on December, 1984 the testimony of witnesses ho appeared before the Grand Jury presided by Mr. José Mariani, impanelled on October, 1983 in connection with its investigation of Serrano/Shearson, American Express et. al.

IT IS HEREBY ORDERED that in presenting to the Grand Jury presided by Mr. Edwin Padovanni, impanelled on December, 1984 the testimony of any witnesses who appeared before the Grand Jury presided by Mr. José Mariani, impanelled on October, 1983 in connection with its investigation of Serrano/Shearson, American Express et. al. The United States Attorney or his designee shall read to the the Grand Jury presided by Mr. Edwin Pavoani, impanelled on December, 1934 the entire transcript of testimony given by each witness with respect to matters under continuing investigation relative to Serrano/Shearson, American Express et. al. and

IT IS HEREBY FURTHER ORDERED that this Order, and the pleading filed by the United States in connection with its issuance, be and shall remain sealed until further Order of this Court.

HECTOR IAFFITTE
UNITED STATES DISTRICT JUDGE

10/30/85

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

MISCELLANEOUS NO. 84-0031 (HL)

IN RE:
MIGUEL A. SERRANO
SERRANO/SHEARSON, AMERICAN
EXPRESS, et. al.

MOTION PURSUANT TO RULE 6(e)(3)(c)(iii), F.R.CR.P.

COMES NOW the United States of america, through its undersigned counsel, and most respectfully states and prays as follows:

1. The Office of the United States Attorney has conducted an investigation of transactions concerning Miguel A. Serrano/Shearson, American Express et. al. concerning certain currency transactions conducted by him. The testimony of several witnesses and documentary evidence related to the Serrano/Shearson American Express et al. investigation has been heard and presented to a grand jury designated "Grand Jury presided by Mr. Jose Mariani," impanelled on October, 1983.

2. The term of the Grand Jury presided by Mr. Jose Mariani, impanelled in 1983, expired on April, 1985.

3. The "Serrano-Shearson, American Express" investigation is massive, and has already resulted in 2 indictments, charging violations of 18 U.S.C. §§1341, 1343, 1006 and 657. The investigation is near completion, with only two more witnesses expected to be subpoenaed. These witnesses will be appearing before the Grand Jury presided by Mr. Edwin Pavoani, impanelled on December, 1984.

4. The Government is seeking the disclosure of all the testimonial and documentary evidence presented to the

Grand Jury presided by Mr. Jose Mariani, impanelled on October, 1983 to the Grand Jury presided by Edwin Pavoani, impanelled on December, 1984 with the purpose of continuing said investigations, and presenting an indictment for the consideration of the Grand Jury.

5. The instant motion is made in good faith, with an interest in achieving judicial economy, and serve the best interests of justice in that a complete factual scenario would be presented to the Grand Jury for consideration during a determination of probable cause to return a true bill on a proposed indictment.

WHEREFORE, the United States respectfully prays an Order issue permitting the disclosure of testimonial and transfer of documentary proof uncovered during the Serrano/Shearson, American Express et al. investigation by the Grand Jury presided by Mr. José Mariani, Grand Jury impanelled on October, 1983, to the Grand Jury presided by Mr. Edwin Pavoani, impanelled on December, 1984.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico this 30th day of October, 1985.

DANIEL F. LOPEZ ROMO
United States Attorney

Lydia Lizarribar
Assistant U.S. Attorney
Criminal Division
Tel. 753-4448

APPENDIX VII

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CRIMINAL NO. 85-0449 (CC)

UNITED STATES OF AMERICA,

Plaintiff

vs.

JOSE TORMOS-VEGA
JUAN LUIS BOSCIO
and MIGUEL SERRANO,

Defendants

ORDER

Once again, codefendant Juan Luis Boscio requests dismissal of the indictment on grounds of "prosecutorial misconduct". He alleges that the government's attorney violated the court's order issued in Misc. No. 84-0031(HL), regarding the transfer of evidence presented before a grand jury to the grand jury that rendered the indictment in this case, in that not *all* the evidence nor *all* the testimonies presented to the first grand jury were presented to this grand jury. He further alleges that since the Magistrate decided in his Report and Recommendation of November 21, 1986 regarding codefendant Serrano's motion to dismiss, that the testimonies of codefendants Boscio and Tormos before the grand jury were the result of Serrano's testimony before the Commonwealth's Senate, this having been the sole evidence presented to the grand jury in this case, there was insufficient untainted evidence to return an indictment against defendant Boscio. Both arguments, presented by motions appealing the Magistrate's denial of his motions to dismiss, lack merit. At the outset, the order

of this Court did not and could not, without unduly encroaching on the prerogatives of the prosecutor and of the grand jury, require the prosecutor to read to the grand jury the entire transcript of the testimony of each and every witness presented to the first grand jury. The Court's order merely *authorized* the US Attorney for this district to disclose and transfer to the second grand jury documentary and testimonial evidence presented to the first. The next to the last paragraph of that order merely specifies that "in presenting to the grand jury presided by Mr. Edwin Padovanni[1] /the grand jury which returned the indictment in this case/, impanelled on December 1984 the testimony of *any* witnesses who appeared before the grand jury presided by Mr. Jose Mariani, impanelled on October 1983 in connection with its investigation of Serrano/Shearson, American Express, et al., the /sic/ United States Attorney or his designee shall read to the /sic/ grand jury presided by Mr. Edwin Padovanni /sic/, impanelled on December 1984 the entire transcript of testimony given by each witness with respect to matters under continuing investigation relative to Serrano/Shearson, American Express, et al." (Emphasis ours.) this proviso of the Court's order is addressed to avoid abuse by the prosecutor in reading only excerpts of a particular witness' testimony. It does not require that *the testimonies of all the witnesses* before the first grand jury be read to the second grand jury, but only that *any* of those presented to the second grand jury be read in its entirety. Furthermore, had the government indiscriminately presented to this grand jury all the evidence presented to the first grand jury, it would have greatly prejudiced the defendant by introducing evidence of criminal conduct already considered by the first grand jury.

We find that the prosecutor did not abuse the grand jury process by presenting to the grand jury in this case

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[1]The first grand jury.

only selective testimonies presented before the first grand jury, the same having been read to the grand jury in their entirety. We find also that the first grand jury never had before its consideration whether the defendant had committed the particular offenses charged in the indictment returned in this case. Therefore, the fact that it did not then indict the defendant for this offense may not be understood as a finding of lack of probable cause. The grand jury in this case was requested to consider defendant's conduct in light of the statutes forbidding certain specified acts not considered by the first grand jury, and it found probable cause to indict. It did so within its own tenure. The cases cited by the defendant in his motion filed on June 11, 1986 are therefore totally inapposite. Finally, defendant's argument that the Magistrate's finding that his testimony and codefendant Tormo's testimony were tainted and could not be considered by the grand jury lacks any substance. Assuming without deciding here[2] that the Magistrate was correct in his finding that the testimonies of these codefendants before the grand jury were a direct result of Serrano's testimony before the Senate under a local grand of immunity, said finding applies only in Serrano's situation. Codefendants Boscio and Tormos have no standing to claim under serrano's immunity. Codefendants testimonies before the grand jury, therefore, could be in violation of Serrano's immunity yet be totally valid and reliable evidence against the other codefendants.

Accordingly, defendant Boscio's appeal[3] from the Magistrate's order denying his motions to dismiss[4] for prose-

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[2]The government's appeal from the Magistrate's Report and Recommendation granting codefendant Serrano's motion to dismiss is considered separately.

[3]Docket entries 222 and 232.

[4]Docket entries 182 and 183.

cutorial misconduct is hereby DENIED, and the Magistrate's order is AFFIRMED.

SO ORDERED.

At San Juan, Puerto Rico this 2nd. day of March, 1987.

CARMEN CONSUELO CEREZO
US DISTRICT COURT JUDGE

APPENDIX VIII

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CRIMINAL 85-0024 (GG)

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIGUEL A. SERRANO d/b/a
PONCE DEVELOPERS, INC., *et al.*,

Defendants.

AMENDED MAGISTRATES' REPORT AND RECOMMENDATION

The Court has asked this Magistrate to specify what transcripts other than that of the Grand Jury testimony of Agent Harry Garcia, January 17, 1985, pp. 19-20, make mention of the immunized testimony of Miguel Serrano. This passage came as Agent Garcia requested opportunity to make a special point at the end of one fairly brief (45 minutes) sitting in which he testified for a single group of grand jurors as to matters later segregated as cases 85-0024 and 85-0449. This Magistrate's earlier report did not indicate that any other direct, point-blank declaration of the fact itself that Serrano had testified under grand of local immunity to the matters of the investigation, existed. Rather, based on our understanding of the principles of the use of immunized testimony in subsequent prosecution, we found the reference there cited serious and blatant enough to compel dismissal of the indictment and the conviction upon which it was based. Furthermore, certain contents of Serrano's immunized testimony, contents

specifically found by Judge Carmen Consuelo Cerezo in her Opinion and Order of April 8, 1987, in Cr. 85-0449 (hereinafter, "Opinion" (attached to docket entry 242 in Cr. 85-0024, Motion to Further Request Bail on Appeal, April 9, 1987), to be *solely* derived from that immunized testimony, were used integrally in the January 17 and February 1, 1985 Grand Jury presentations of matters eventually constituting case 85-0024, a use which, as detailed below, compels dismissal.

We withdraw the statement that we believe the Court did not have the benefit of having read the same transcripts in its August 28, 1985 in-camera inspection of Grand Jury proceedings.

The hearing on this matter and other post-trial motions took place on March 6, 1987, at 6:52 p.m. (see Transcript, 39 pages), immediately after this Magistrate had sat through a two-hour hearing before Judge Cerezo regarding the use of Serrano's immunized testimony in Cr. No. 85-0449 (Tr. 27). In this Magistrate's hearing, the parties were given opportunity to present whatever would not have ben repetitive of the Judge's hearing (Tr. 27, 30-38). Because certain critical background and factual findings in that immediately prior hearing apply to the issues here, we refer extensively to the Judge's Opinion.

The law regarding the use of immunized testimony is amply reviewed in that Opinion and Order, dismissing the indictment in 84-0449 (Opinion, 15-21, 34; law's application, 21-35).

In a leading case on the issue, *Kastigar v. United States*, 406 U.S. 441, 453 (1972), the Supreme Court stated that "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom," is coextensive with the Fifth Amendment privilege and "prohibits the prosecutorial authorities from using the compelled testimony in any respect. . . ." (Emphasis in original.) This immunity "leaves the witness and the government in

substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity." *Id.* at 458-59. The total prohibition bars the use of compelled testimony as an investigatory lead, to search out other testimony, its use in gaining knowledge of a crimes details and of sources which may supply other means of conviction, and the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures. *Id.* at 454.

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. 378 U. S., at 79 n. 18.

Id. at 460 (quoting *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 N.18 (1964)).

One raising his claim need only show he testified under a grant of immunity to shift the burden to the government. That burden is heavy; it is not limited to a negation of taint; it imposes the affirmative duty to prove derivation of the proposed evidence from a legitimate source wholly independent of the compelled testimony, and it must encompass *all* the evidence. *Id.* at 460-461.

As Judge Cerezo's Opinion details, there have been cases in which the government has been so involved with the evidence obtained under grant of immunity that it has been practically impossible, an "insurmountable task," to discharge its burden.

> In *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) the Court found that the prosecutor's reading of defendant's immunized testimony without knowing at the time that the testimony was given pursuant to a grant of im-

> munity and the prosecutor's ensuing failure to perceive any reason to segregate the testimony and not use it as "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross examination, and otherwise generally planning trial strategy," made the government's burden of showing independent sources for its evidence an "insurmountable task". *id.*

Opinion at 19.

> More closely analoguous (sic) to our case is the situation present in *United States v. Hampton*, 775 F.2d 1479 (11th Cir. 1985). There, as here, there was a "breadth of exposure" to immunized information, "lack of contemporaneous knowledge of the *Kastigar* problem, (and) absence of contemporaneous precautions against intentional or unintentional use of immunized materials in furtherance of the federal investigation." *id.* at 1491 N. 53 (sic). There, as here, the government lent itself to the impossible task of "legitimating all of the government's evidenced after the fact" *id*, a task which failed to meet the required burden by a very wide margin.

Opinion at 34.

To prevent the government's task from becoming "insurmountable," the Department of Justice provides a detailed set of guidelines for its attorneys to follow whenever a defendant, actual or potential, will testify under a grant of immunity to matters related to a pending criminal investigation or a case being prosecuted. The attorney of the government is required to take the following steps:

> 1. before the witness has testified or provided other information, prepare for the case file a signed and dated memorandum summarizing the

> evidence then known to exist concerning the witness, and designating its sources and date of receipt;
>
> 2. ensure that all testimony given, or information provided, by the witness be recorded verbatim and that the recording or reporter's notes, together with any transcript thereof, be maintained in a secure location and that access thereto be documented and;
> 3. maintain a record of the nature, source and date of receipt of evidence concerning the witness' past criminal conduct that becomes available after he/she has testified or provided other information; or. . . .

Opinion at 20 (citing United States Attorney's Manual of March 23, 1984, Tit. I, Ch. 11.330).

In the event of future prosecution, the government must be prepared to demonstrate convincingly that its evidence was developed independently of the compelled testimony or of information derived therefrom. It will also have to show that it has made no "nonevidentiary" use of the testimony or its fruits. Unless the steps of maintaining a record of all untainted evidence, maintaining the compelled testimony in a secure place, and documenting of access are taken, "it may prove impossible to establish the purity of the government's case in a future prosecution of the witness." Moreover, prosecution of a witness to be charged with an offense first disclosed in or closely related to his or her compelled testimony is not to be initiated without the personal authorization of the Attorney General. (Opinion at 19-21) (quoting the Manual).

As Judge Cerezo noted, the inquiry centers on whether the government made use of the protected testimony in procuring the indictment. "In order to examine this fundamental issue, we must make an indepth examination of case agent Garcia's handling of the evidence before and

after Mr. Serrano's immunized testimony." Opinion at 2-3. The Judge found that on February 19, 1984, the investigation generally referred to as Shearson-American Express, comprising the transactions in what became three criminal cases, 84-0381 (JP), 85-0024 (GG), 85-0449 (CC), "was assigned to agent Garcia who was also handling fifteen other cases and who could devote only 20-25% of his time to the Shearson investigation." *Id.* She found that he still had thousands of documents to review and that he acknowledged he only had a general idea of the case, that he watched and videotaped the entire Serrano testimony, viewed the tapes three or four times looking for information for the case, that these tapes and transcripts thereof were readily accessible to him and in his control though their transcript was hand-delivered through his instructions to Assistant United States Attorney Lydia Lizarribar, that he had nothing specific before the hearings to corroborate by watching them. *Id.* at 3-7. After thorough analysis, the Judge ultimately found that critical details of the distribution of kickback payments by Serrano to Tormos Vega and Boscio, namely, the $110,000 amount each of these latter received and the fact that the first payment was in money orders totaling $10,000 for Boscio and $110,00 for Tormos, and the second, in money orders totaling $100,000 for Boscio, was information obtained originally exclusively from the immunized testimony, in spite of the government's attempt to show an independent source in Francisco Pujol. *Id.* at 5-8, 25-28. The Judge also found that Garcia's testimony about the Orlando meeting, with its objective to plan an explanation and cover-up of the $220,000 payments, was originally exclusively discovered from the immunized testimony, in spite of the agent's telling the jurors of two other sources. *Id.* at 8-10, 12, 31. The Judge found in agent Garcia's October 31, 1985 Grand Jury presentation at least three direct references to the fact that Serrano had testified under a grant of local immunity. *Id.* at 29-30.

Furthermore, Judge Cerezo found it significant that neither case agent Garcia nor Assistant United States Attorney Lydia Lizarribar, in charge of prosecuting the case, knew of the existence of the Attorney General's guidelines until after the defendant brought them up. *Id.* at 22, referring to the transcript of August 18, 1986, p. 82. The Judge had serious doubt whether, not only the non-attorney case agent, but also the United States District Attorney Daniel Lopez Romo, "were really aware of the constitutional ramifications of the situation they were facing before and after Serrano testified under immunity." *Id.* The Judge further recounted that the District Attorney had acknowledged watching some hours of Serrano's testimony to see how Serrano "was going to go around the *Waterfront* situation. . . ." *Id.* at 5. She found that he had only a limited understanding of the *Murphy Kastigar* principles, an inference from his not "see(ing) anything wrong" in Serrano's immunized testimony going before the Grand Jury and his statement that it could be used for impeachment,

> uses which are clearly proscribed by *Kastigar's* absolute bar to use of compelled testimony in "any respect," *id.* at 453. It is perhaps due to this ignorance of the relevant constitutional safeguards that government involvement with Serrano's immunized testimony as shown by the agent's deliberate exposure to it, was so pervasive. From the moment Garcia learned that Serrano was going to testify in televised hearings before the Puerto Rican Legislature, he took it upon himself to become saturated with the contents. . . .(I)t is . . . clear from the record before us that the agent assigned to the case, informed of the impending immunized testimony but ignorant of the safeguards, his actions unsupervised as to this potential constitutional danger, jumped at the opportunity (of) using the immu-

> nized testimony as a means of advancing, organizing and gaining insight into voluminous materials, mostly unread documents, in his files related to complex financial transactions.

Id. at 23-25.

In dismissing the indictment in 85-0449, the Judge summarized the Court's position: "Where we to remain impassive to the government's trampling of Serrano's rights, due to a great extent to its own ignorance of the applicable constitutional standards, we would be failing in our duty." *Id.* at 34-35.

The inquiry remains, was any use or derivative use of Serrano's immunized testimony made to obtain indictment against him in Cr. 85-0024. We find that it was.

The most blatant use was agent Garcia's direct reference to the fact that Serrano had testified in the well-publicized hearings of September 1984 under a grant of local immunity. This reminder necessarily conveyed to the jurors a consciousness of guilt on Serrano's party and attempted to influence their perception of Serrano's criminal involvement in an umbrella fashion. *See* Opinion, 30, 33. It cannot be seriously argued that it could not, or that it was harmless beyond a reasonable doubt, *United States v. Hampton,* 775 F.2d 1479, 1489 n.51 (11th Cir. 1985) (citing *United States v. Byrd,* 765 F.2d 1524, 1529 n.8 (11th Cir. 1985)). In addition, the contents of "(t)hat evidence was highly probative of guilt for the act of covering up would indicate to the jurors that Boscio, Tormos and Serrano, partners in crime, met to conceal the conspiracy charged so as not to be detected and apprehended." Opinion, 33.

This reference to both the fact and the contents of immunized testimony infects not only the second transaction but the entire presentation because of the latter's brevity and because of the perceived unity of the matter. The

agent had been presented as being in charge of *the* matter of Shearson-American Express (Tr. January 17, 1985 at 3). That day they were to continue *the* investigation of the Municipality of Ponce, specifically, two transactions between that municipality and Shearson-American Express. The two are presented back-to-back in a brief period, and any separation in the jurors' minds is only speculative. Thus, the case is set before the Grand Jury as one matter, one investigation, by one agent, which for convenience is divided into two transactions in that day's discussion. The direct, open reference of agent Garcia to the public hearings directly colors all preceding testimony with the effect of Serrano's paublic declaration of involvement in illegal acts. Its effects are not, and cannot be conceived to be, relegated merely to the second transaction discussed in the relatively brief session. "The prospect of peering into the grand jurors' minds, or of examining them individually to ascertain whether Hinton's testimony was improperly used is both impractical and unpalatable." *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 9176). The reference is directly and visibly contrary to the standard that *none* of the evidence presented to the Grand Jury be derived, directly or indirectly, from immunized evidence. It was also ignorant.

In addition to the umbrella effect of this direct reference on January 17, 1985, there twice was actual interweaving of the prohibited evidence of the second transaction, 85-0449, details of the $600,000 commission payment from Ponce to Serrano doing business as Ponce Developers, Inc., with the evidence of the first transaction, 85-0024, the use for personal gain of the one million dollars diverted from the Repo 196 loan from Shearson to Ponce (Tr. January 17, 1985 at 3). In answering what Serrano did with his million dollar profit held in his Ponce Developers account at Shearson, within the first transaction, the agent included specifically the use of that money in the transaction that would become 85-0449:

> Part of the money was traced to build his house in Luquillo. Part of the money, maybe about $200,000, went to Texas for the oil wells. And the rest of the money was used for transactions that he conducted with Home Federal on the first case that we-

Tr. January 17, 1985 at 11.

Literally moments later, Assistant United States Attorney Lizarribar passed to testimony of the second transaction, 85-0449, the details of which were determined by Judge Cerezo to be prohibited use of immunized testimony. The agent again drew the connections between, and clarified the details of, the personal account involved in the first transaction and the payments to Boscio and Tormos Vega in the second:

> Q. Okay. I believe this one is clear. Let us go to the second transaction, Mr. Garcia. What were your findings from your investigation as to those $660,000? Where did that money come from, if you know?
>
> A. Okay. On or about May of 1983 Shearson—and when I say "Shearson," Mr. Pujols and Mr. Mioguel Serrano—closed a transaction with Ponced—
>
> Q. When you say "Ponce," do you mean the Municipality of Ponce?
>
> A. Correct.—in which Ponce was investing in approximately $660,000 of Ginnie Maes and other securities, and of course Ponce was going to be receiving a spread. Shearson collected their commissions on transactions. Thereafter, the first part of June—when I say "the first part of June," June 6, '83—Attorney Juan Boscio, who was at the time the president of Ponce Municipality De-

velopment Authority, Inc., telephones Augusto Zayas and advises him that he's to appear in San Juan the next day to sign some documents at the Condado Holiday Inn. This is Mr. Zayas' version of what happened on that June 6th. I'm going to go by dates. I will get to—Attorney Boscio states that he had spoken to Zayas and that Zayas had indicated that Miguel Serrano at Shearson had called him to advise him that they owed him some commissions on this transaction, on the $660,000 transaction, and that they needed to sign some documents to authorize the payment of $660,000. . . . On the same date of June 6, 1983 *Mr. Serrano withdraws $120,000 from that account we were talking here at Shearson, Ponce Developers, Inc.*, and he gets a Shearson check for $120,000 which is issued to the order of Ponce Developers, Inc. He delivers that check to Jaime Davila at Home Federal, and on the following date, on June 17th, *that check is exchanged from 120 money orders of $1,000 each.* On that same date Attorney Boscio stops at Home Federal and picks up the 120 money orders from Davila and he signs for those money orders. He then takes those money orders to Miguel Serrano in San Juan at this offices at Shearson, and *from there he gets $10,000 from Serrano.* Up to this point Attorney Boscio alleges that was a loan. So he gets $10,000 from Serrano. . . .

Q. Was that in cash, in check, or—

A. In money orders. *He gets ten money orders. Then Serrano advises him if he could do him the favor and deliver the other money orders to the mayor, Jose Tormos Vega.* So Atotrney Boscio—this is all the same date—runs to Ponce and goes to the residence of the mayor, Jose Tormos Vega, and *hands him an envelope with 110 money orders*

> and he tells the Mayor, "This is from Serrano." And supposedly the mayor indicates, "Okay," and he takes the envelope.

Tr. January 17, 1985 at 11-14.

Thus agent Garcia identified the million dollar profits from the Repo 196 transaction of 85-0024, held in the personal account of Serrano as Ponce Developers, Inc., detailed in the first part of his testimony, as the source of the $120,000 for the buying of the 120 money orders of $1,000 each, of which Boscio gets 10 and Tormos Vega gets 110, precisely the details determined by Judge Cerezo to be prohibited use. A few minutes later, agent Garcia describes the conflicting versions of Tormos Vega and Boscio regarding the cover-up loans, Tr. January 17, 1985 at 18-19, and clinches his point with the reminder of the fact of Serrano's testimony under local immunity and the testified matter of the Orlando meeting at which the cover-up was planned, *id.* at 19-20, again uses determined by Judge Cerezo to be prohibited.

Precisely this same interweaving and use occurred again in the February 1, 1985, Grand Jury presentation to obtain the indictment in 85-0024. This was still the same group of jurors as on January 17, 1985:

> Q. Sir, from your investigation, do you know what happened to that million dollars?
>
> A. Yes. The million dollars was initially invested by Mr. Serrano in securities through his account at Shearson . . . and he was not authorized, he could not do transactions as an independent person with a client of Shearson, and what he was doing here, he was taking a client of Shearson, in this case, Ponce, and setting up another account to do business with them while he was still an employee of Shearson.

Q. Sir, do you know from your investigation *if Mr. Miguel A. Serrano used any of those monies, the one million dollars for his own personal benefit?*

A. Yes.
(In summary, he stated that, after earning some $120,000 on the interest, he withdrew the money to two accounts at Home Federal and Caguas Federal; that from the latter he used it for building his house in Luquillo, for personal use, for the Midland, Texas, oil wells.)

Q. Sir, *do you know if any of the other co-defendants in this case received any money from that—those personal accounts of Mr. Miguel Serrano?*

A. *From this million dollars, through my investigation, I traced that $120,000 he gave to Mr. Boscio.*

Q. And in what form, sir.

A. In the form of money orders.

Q. Were those money orders or cash?

A. Yes.

Q. Do you know if they were cashed by Mr. Juan Luis Boscio?

A. Mr. Boscio, from these, *Juan Luis Boscio, from these money orders, all that he received was $10,000.*

Tr. of February 1, 1985, 16-18.

A few minutes later, while in the process of clarifying who was defrauded by the Repo 196 scheme, the mixing and use again occurred:

Q. Okay, sir. When you mentioned that *Miguel Serrano had opened the account under the name of Ponce Developers, Inc., at Shearson-American Express, is that the account for the million dollars credited*—where the million dollars was credited?

A. *Yes.*

Q. *Was that the same money that you traced in your investigation for Miguel Serrano's personal use?*

A. *Yes.*

Q. And was *the account of—where the $10,000 received by Mr. Juan Luis Boscio came From*?

A. *Yes.* One more addition to who was defrauded, even though it is not included in this indictment. . . .

Tr. February 1, 1985 at 23-24.

Hence, the fact that Serrano had personal gain to drive him to commit the first transaction was brought home copellingly by detailing his use of the profits to carry on critical acts of the second transaction, acts shown by Judge Cerezo to be originally exclusively learned from the immunized testimony. This strategy in agent's testimony occurred at least twice in each presentation of agent Garcia on January 17, 1985 and February 1, 1985, the latter being the day the indictment was actually presented. In the January 17, 1985 presentation, as shown above, the agent then goes on to gather the acts together inthe attempted cover-up, details the conflicting versions, directly implicates Serrano in the cover-up conspiracy, and reminds the Grand Jury of Serrano's testimony under local immunity, driving home the consciousness of guilt and inescapably affecting the jurors' perception of Serrano's criminal involvement in the whole, including the diversion and self-interested use of the million dollars.

In conclusion, we quote two noted jurists to support our recommendation that the indictment be dismissed.

> The privilege against self-incrimination is as broad as is necessary to guard against the mischief from which protection is sought. It is, therefore, not to be interpreted in a hostile or niggardly fashion but rather in a liberal spirit.

In Re Kave, 760 F.2d 343, 354 (1st Cir. 1985) (Torruella, J.).

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935) (Sutherland, J.).

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See: United States v. Escoboza Vega*, 678 F.2d 376, 379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

In San Juan, Puerto Rico, this 21st day of July, 1987.

/s/JUSTO ARENAS
JUSTO ARENAS
United States Magistrate

APPENDIX IX

SUPREME COURT OF THE UNITED STATES

No. A-124

JUAN LUIS BOSCIO,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 20, 1987.

/s/William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of August, 1987

Supreme Court, U.S.
FILED
NOV 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-460

In the Supreme Court of the United States

OCTOBER TERM, 1987

JUAN LUIS BOSCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the denial of his motion to dismiss the indictment on grounds of grand jury error is subject to interlocutory review.

1. On October 31, 1985, petitioner and a co-defendant were indicted on three counts of extortion, in violation of 18 U.S.C. 1951. Petitioner moved to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury,[1] asserting that the prosecutor had exposed the grand jury to the co-defendant's "tainted" immunized testimony; that the prosecutor had improperly influenced the grand jury; that a federal agent had lied before the grand jury; that the prosecutor had excluded exculpatory evidence requested by the grand jurors; and that unautho-

[1] Petitioner also moved to dismiss the indictment on double jeopardy grounds. The district court denied that motion. Petitioner's interlocutory appeal from the district court's order, C.A. No. 87-1103, is currently pending in the court of appeals.

rized persons had been present in the grand jury room. That motion was denied by the district court (Pet. App. 52a-55a). Petitioner then filed a notice of appeal from the district court's order.

Before briefing on the merits, the court of appeals ordered petitioner to show cause why the appeal should not be dismissed on jurisdictional grounds. In its show-cause order, the court of appeals stated that "[u]pon review of the record in this case it appears that this court may not have jurisdiction to consider the appeal because the order denying the motion to dismiss is an interlocutory order" (Pet. App. 4a). In response (see *id.* at 11a-38a), petitioner pointed to this Court's decision in *United States* v. *Mechanik,* 475 U.S. 66 (1986), which held that a conviction at trial renders "any error in the grand jury proceeding connected with the charging decision * * * harmless beyond a reasonable doubt" (*id.* at 70 (footnote omitted)). Because *Mechanik* makes it impossible to raise his grand jury claims after conviction, petitioner contended, the district court's dismissal of his motion should be viewed as an appealable collateral order within the meaning of *Cohen* v. *Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). In a brief order, the court of appeals dismissed petitioner's appeal.

2. As petitioner notes (Pet. 23-25), the courts of appeals have taken differing approaches to the appealability of claims of grand jury error. The Ninth Circuit, in *United States* v. *Benjamin,* 812 F.2d 548 (1987), and *United States* v. *Dederich,* 825 F.2d 1317 (1987), has held that all grand jury claims may be raised on interlocutory appeal. The court reached that conclusion after first concluding that *Mechanik* bars any post-conviction appeal challenging errors committed before the grand jury; in the absence of a right to post-conviction review, the court has held, a defendant is entitled to raise such claims on appeal before trial. In contrast, the First Circuit in this case refused to

permit petitioner to raise a claim of grand jury error on interlocutory review. In a subsequent decision, the First Circuit has held more generally that the denial of a motion to dismiss on grounds of grand jury error may not be reviewed before trial, even if the claim could not be raised after trial because of *Mechanik*. See *United States* v. *LaRouche Campaign*, 829 F.2d 250 (1987). The Tenth Circuit, in *United States* v. *Taylor*, 798 F.2d 1337 (1986), has also refused to entertain an interlocutory appeal from the denial of a motion to dismiss on grounds of grand jury abuse, but for a different reason: in the Tenth Circuit's view, claims of serious grand jury error may be raised after conviction notwithstanding *Mechanik*; accordingly, there is no need to permit such claims to be the subject of pretrial appeals.

Although this issue may ultimately warrant this Court's review, we believe that it would be premature for the Court to consider the question at this time. Because the Tenth Circuit would not permit an interlocutory appeal on the facts of this case, the First Circuit's decision in this case conflicts only with the Ninth Circuit's decisions in *Benjamin* and *Dederich*. The government has filed petitions for rehearing en banc in both of those cases, contending that claims of grand jury error are not appealable either before or after conviction. The Ninth Circuit has called for responses from the defendants to both petitions, which remain pending. If the government ultimately prevails in those cases, the conflict among the circuits will be substantially, if not wholly, resolved.[2] We submit, there-

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[2] To be sure, the Tenth Circuit's approach to the problem differs from the approach adopted by the First Circuit in the *LaRouche Campaign* case, since the Tenth Circuit has based its refusal to permit interlocutory appeals on the ground that certain grand jury issues may be raised after conviction, while the First Circuit would not permit interlocutory appeals in the case of claims of grand jury abuse, even if

fore, that the prospect of a conflict among the circuits on this issue, while real, has not yet ripened to the point that this Court's intervention is called for.

It is worth adding that petitioner's claims of prosecutorial misconduct before the grand jury are frivolous on the merits. Petitioner's principal claim (see Pet. 14-17) is that the prosecutor disregarded a court order in failing to read the entire transcript of the proceedings before the first grand jury to the second grand jury that indicted petitioner in this case. As the district court explained in rejecting this contention, however, "the order of this Court did not and could not * * * require the prosecutor to read to the grand jury the entire transcript of the testimony of each and every witness presented to the first grand jury. The Court's order merely *authorized* the United States Attorney for this district to disclose and transfer to the second grand jury documentary and testimonial evidence presented to the first" (Pet. App. 52a-53a (emphasis in original)). Petitioner also contends that the prosecutor erred in submitting to the grand jury evidence produced by petitioner's co-defendant under a grant of immunity (as well as the fruits of that evidence) (see Pet. 17-20). But as the district court observed, petitioner has "no standing to

---

Mechanik forecloses post-conviction review of such claims. Nonetheless, both the First and Tenth Circuits would refuse to permit interlocutory review in this case and in many other cases raising grand jury issues. At least with regard to the issue of appealability, the Tenth Circuit's analysis would foreclose interlocutory appeal on all grand jury claims, with the possible exception of claims that *Mechanik* squarely held to be barred from consideration on post-conviction review. As to those claims, the Tenth Circuit has not ruled whether interlocutory appeals would be permitted, since the *Taylor* case did not involve a claim falling into that category. Any possible conflict between the First and Tenth Circuits, therefore, will arise only if and when the Tenth Circuit allows a grand jury challenge to be raised before trial on the ground that it would be barred from being raised after conviction.

claim under [the co-defendant's] immunity" (Pet. App. 54a). Indeed, any other conclusion would make it impossible ever to use immunized testimony for any purpose.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1987

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed pursuant to Rule 22.6 of the Rules of this Court to address the significance of an intervening action of the Court of Appeals for the Ninth Circuit. As we explained in our opposition to the petition for a writ of certiorari, there currently is a split in the circuits on the appealability of claims of grand jury error. The First and Tenth Circuits have held that the denial of a motion to dismiss an indictment on grounds of grand jury error may not be reviewed on appeal before trial. See *United States* v. *Larouche Campaign*, 829 F.2d 250 (1st Cir. 1987); *United States* v. *Taylor*, 798 F.2d 1337 (10th Cir. 1986).* The Ninth Circuit, in contrast, has held that

* These courts have taken different approaches, however; the Tenth Circuit held in *Taylor* that most claims of grand jury error may be raised on appeal after conviction, while the First Circuit in *Larouche Campaign* reserved judgment on the question whether such claims are ever appealable.

all grand jury claims may be raised on interlocutory appeal. See *United States* v. *Benjamin*, 812 F.2d 548 (1987); *United States* v. *Dederich*, 825 F.2d 1317 (1987). In our opposition we nevertheless suggested that it would be premature for the Court to consider this issue because petitions for rehearing en banc were pending in *Benjamin* and *Dederich* that, if granted, might have eliminated the conflict. On December 4, 1987, however, the Ninth Circuit denied the government's rehearing petitions in both *Benjamin* and *Dederich*, thus dispositively establishing the conflict in the circuits.

We believe that the decision below—that challenges to grand jury actions may not be raised on interlocutory appeal—is correct. But the appealability issue, which may arise in every case involving claims of grand jury error, is of considerable practical importance. Because there is now a firmly established split in the circuits on the proper approach for courts to take in resolving challenges to grand jury actions, and because review of the decision below would allow the Court to settle the question during its current Term, we believe that it would be appropriate for the Court to consider the issue at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

DECEMBER 1987

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